REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LCA 95/2011

In the matter between:

PRIMEDIA OUTDOOR NAMIBIA (PTY) LTD **APPELLANT**

And

TIRONENN NATANGWE KAULUMA **RESPONDENT**

Neutral citation: *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2014] NALCMD 41 (17 October 2014)

Coram: VAN NIEKERK J

Heard: 28 September 2012

Delivered: 17 October 2014

Flynote: **Labour law** – Application for condonation for failure to serve notice of appeal, for failure to prosecute appeal in time and application for leave to amend notice of appeal – Rule 17 of Labour Court rules and rule 23 of conciliation and arbitration rules discussed.

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ORDER

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1. The application for condonation, re-instatement of the appeal and for leave to amend the grounds of appeal is dismissed.
2. There shall be no order as to costs.

JUDGMENT

VAN NIEKERK J:

Introduction and background

[1] In this matter the parties were involved without legal representation in a labour dispute before an arbitrator under the Labour Act, 2007 (Act 11 of 2007) ('the Labour Act'). The arbitrator gave her award on 5 December 2011. At some stage the appellant instructed legal practitioners who on 16 December 2011 served a copy of the appellant's notice of appeal on the Labour Commissioner and filed the original at the Registrar of the Labour Court. The notice of appeal was not served on the respondent.

[2] On 3 April 2012 the appellant served an application to stay the execution of the award on the respondent after a notice to comply with the arbitration award had been issued by a labour inspector pursuant to the provisions of section 90 of the Labour Act. The respondent instructed lawyers to act on his behalf and on 17 April 2012 the respondent's legal practitioners filed a notice of opposition to the application. The application was postponed *sine die* on 20 April 2012. According to information provided in the respondent's heads of argument the award had been executed by 18 June 2012. This information was not disputed by the appellant.

[3] On 21 June 2012 the appellant applied for a date for hearing of the appeal and on 29 June 2012 delivered a notice of set down of the appeal. These steps took place with notice to the respondent.

[4] On 9 July 2012 the appellant's legal practitioners signed the index to the appeal record and on 12 July 2012 they signed the certificate in terms of Labour Court rule 17(12). On 20 July 2012 the certificate, index and appeal record were served on the respondent's legal practitioners and lodged with the Registrar.

[5] On 10 September 2012 heads of argument were filed on behalf of the appellant with a copy served on the respondent. On 18 September 2012 heads of argument were filed by the respondent with a copy served on the appellant.

[6] In the respondent's heads of argument certain points *in limine* were raised, while no argument was addressed on the merits of the appeal. In the heads of argument it was conveyed that the notice of appeal was never served on the respondent, but that the respondent became aware of the appeal only when the application to stay the execution of the award was served on the respondent as a copy of the appeal notice was attached to this application.

[7] The points *in limine* are essentially three. The first is that there is no proper appeal before this Court because the notice of appeal was not served on the respondent in terms of rule 17(4) of the Labour Court rules within 30 days after the award came to its notice and, further, because there was no such service, the notice of appeal was never delivered as required by the rules. The second point is that the appeal has lapsed for failure of timeous prosecution in terms of rule 17(25). The third point is that the notice of appeal does not raise questions of law only as required by the Labour Act and that the raising of new and different grounds of appeal for the first time in the appellant's heads of argument in an attempt to correct this mistake is impermissible.

[8] The heads of argument prompted a hasty application by the appellant which was served on the respondent just after 8h00 on the morning of the hearing only. The application prays for an order in the following terms –

> '1. Condoning any non-compliance with rules of this Honourable Court and more specifically, regards to rules 6, 15, 17(4) and 17(25).
>
> 2. Insofar as it is necessary to do so and in the event of this Honourable Court finding that the appeal so noted has lapsed, re-instating the Appeal so noted by the Applicant/Appellant against the findings of the Arbitrator.
>
> 3. Granting the Applicant Leave to Amend and/or to Add to the grounds of appeal so set out in the Notice of Appeal.
>
> 4. Further and/or alternative relief.'

[9] At the hearing Mr *Muluti* appeared for the respondent. Although Mr *Muluti* protested the lateness of the application, he indicated that he would oppose and

argue the matter on the papers without the respondent requiring time to file an opposing affidavit.

[10] Rule 17(6) of the Labour Court rules provides that a person served with a notice of appeal is entitled to appear and be heard at the hearing of the appeal. Although it is common cause that the appellant was not served with the notice of appeal (indeed, that is the respondent's complaint), the appellant did not object to the respondent appearing and being heard.

[11] The parties addressed arguments only on the respondent's points *in limine* and the appellant's application. As the application was chiefly aimed at correcting the faults exposed by the points *in limine*, the application was heard first. The respondent's argument was adapted to attempt to persuade the Court why the application should not be granted.

The law

[12] The legal principles applicable to applications for condonation for non-compliance with the rules of court have been set out time and again. These were conveniently summarized and set out in *Telecom Namibia Ltd v Michael Nangolo and 34 others* (LC33/2009, Unreported - 28 May 2012, at paras. [5] – [8]) as follows:

> '[5] The following principles can be distilled from the judgments of the Courts as regards applications for condonation:
>
> 1. It is not a mere formality and will not be had for the asking.[1] The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.[2]
> 2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.[3]

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[1] Beukes and Another v Swabou and Others [2010] NASC 14 (5 November 2010), para 12.
[2] *Father Gert Dominic Petrus v Roman Catholic Archdiocese* , SA 32/2009, delivered on 09 June 2011, para 9.
[3] *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13.

3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.[4]
4. The degree of delay is a relevant consideration;[5]
5. The entire period during which the delay had occurred and continued must be fully explained;[6]
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.[7] (Legal practitioners are expected to familiarize themselves with the rules of court).[8]
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.[9]
8. The applicant's prospects of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*[10], Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.[11]

Factors taken into account whether or not to grant condonation

[6] These factors are stated in *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445, para 45 as follows:

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[4] *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5.

[5] Pitersen-Diergaardt v Fischer 2008(1) NR 307C-D(HC)

[6] *Unitrans Fuel and Chemical (Pty) Ltd v Gove –Co carriers CC* 2010 (5) SA 340, para 28

[7] *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B; *Moraliswani v Mamili* 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.

[8] *Swanepoel, supra* at 3C; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para 47.

[9] *Swanepoel, supra* at 5A-C; Vaatz: *In re Schweiger v Gamikub (Pty) Ltd* 2006 (Pty) Ltd 2006 (1) NR 161 (HC), para; Father Gert Dominic Petrus v Roman Catholic Diocese, case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.

[10] 1985 (4) SA 773 (A)

[11] Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A).

1. The importance of the case;
2. The prospects of success;
3. The respondent's interest in the finality of the case;
4. The convenience of the court;
5. The avoidance of unnecessary delay.

[7] In the case of *Darries v Sherriff, Magistrate's Court, Wynberg and Another*[12], the South African Supreme Court of Appeal stated:

> 'that an application for condonation for non-compliance with the law is not a mere formality but an application which should be accompanied with an acceptable explanation, not only, for example, the delay in noting an appeal but also any delay in seeking condonation.'

[8] Based on the authorities, before considering the prospects of success in the present case, I must be satisfied as to the following:

(a) That the applicant /appellant has offered an acceptable and reasonable explanation for the delay.
(b) That it has given a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.'

<u>The appellant's application</u>

[13] I shall deal with the relief sought by the appellant in the same order as it is prayed for in the notice of motion.

Non-compliance with rules 6 and 15

[14] Rule 6 deals with the form and time periods applicable to applications. Rule 6(23) deals with interlocutory and other applications incidental to pending proceedings.

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[12] 1998 (3) SA 34 (SCA) at 40I-41D

[15] Rule 15 is the rule that provides that this Court may, on application and on good cause shown, at any time condone any non-compliance with the rules and extend or abridge any period prescribed by the rules.

[16] The application does not expressly state in which respect these rules were not complied with or provide any explanation in regard thereto. I shall therefore not consider this issue any further.

Non-compliance with rule 17(4) – delivery of notice of appeal

[17] The application is supported by two affidavits. The first is by the appellant's managing director and the second is by a legal practitioner practicing as such with the firm of the appellant's legal practitioners of record.

[18] In summary the explanation by the legal practitioner amounts to this. She received instructions from the appellant to appeal against the award. The notice of appeal was drafted and she filed it with the Registrar on 16 December 2011. She then telephoned the respondent to arrange for service of the notice of appeal on him. He was not in Windhoek, but said that he would be back on Monday, 19 December 2011. The legal practitioner left for Swakopmund for the weekend and returned to Windhoek to serve the notice on 19 December 2011. The respondent did not answer his telephone. She states that she could not manage to have the notice served at his address as he was not there. She then left Windhoek on holiday with the intention to attend to service of the notice upon her return during the first week of January 2012. She returned to her office on 3 January 2012, but completely forgot to have the notice of appeal served. She only realized on or about 26 September 2012 that the notice of appeal was never served after instructed counsel requested her to check her file. Although she does not say so, it is fair to assume that counsel did so when alerted by the contents of the respondent's heads of argument. The legal practitioner does state that she did not read the respondent's heads, but forwarded them to instructed counsel to prepare for the appeal hearing. She states that she was at all relevant times under the mistaken belief that the notice of appeal had indeed been served. This belief arose from the fact that she had forgotten that she had not caused the notice of appeal to be served, and from the fact that the

respondent filed a notice of opposition and later heads of argument. She apologizes for her oversight and submits that the appellant should not be prejudiced thereby, but should be excused.

[19] The explanation overlooks, *inter alia*, the fact that the notice of opposition was filed in relation to the application to stay execution and was not a notice of opposition to the appeal. It is not clear whether the legal practitioner is saying that she mistook the notice of opposition for a notice that the appeal is opposed in terms of rule 17(16)(a) and wrongly assumed that the notice was late and also did not comply with rule 17(16)(b) by not providing a statement setting out the grounds of opposition.

[20] The affidavit by the managing director is also not clear on this. Apart from numerous incorrect references to the rules (e.g. rule 16, instead of rule 17(16); rule 16(a) and (b) instead of rule 17(16)(a) and (b); rule 11(a) and (b) instead of rule 17(16)(a) and (b), etc.), it also confuses the two notices of opposition (cf. paras. 20 and 21). Furthermore, the managing director appears to state, on the one hand that the belief was that the appeal was opposed, although late and not in compliance with rule 17(16) (see para. 21), while also stating, on the other hand, that the appellant believed the appeal was unopposed (see paras. 15, 16, 27 and 33). The question arises, if the appellant believed the appeal was unopposed, why did it serve the record, the notice of application for a hearing date, the notice of set down and the heads of argument on the respondent?

[21] Rule 17(3) of the Labour Court rules provides that an appeal against an arbitration tribunal ward –

> ‘must be noted in terms of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published in Government Notice No. 262 of 31 October 2008 (hereafter “the conciliation and arbitration rules”), and the appellant must at the time of noting the appeal -
>
> (a) complete the relevant parts of Form 11;
>
> (b) deliver the completed Form 11, together with the notice of appeal in terms of those rules, to the registrar, the Commissioner and the other parties to the appeal.’

[22] Rule 17(4) of the Labour Court rules provides that –

> 'The notice of appeal referred to in subrule …..(3) must be delivered within 30 days after the award …… appealed against came to the notice of the appellant.'

[23] As rule 17(3) requires compliance with the conciliation and arbitration rules, it is necessary to consider these rules as well.

[24] Rule 23(1) and (2) of the conciliation and arbitration rules provide:

> '**23.** (1) Any party to an arbitration may, in accordance with subrule (2), note an appeal against any arbitration award to the Labour Court in terms of section 89 of the Act.
>
> (2) An appeal must be noted by delivery, within 30 days of the party's receipt of the arbitrators' award, to the Labour Commissioner of a notice of appeal on Form LC41, which must set out –
>
> (a) whether the appeal is from the judgment in whole or in part, and if in part only, which part;
>
> (b) in the case of appeals from an award concerning fundamental rights and protections under Chapter 2 and initially referred to the Labour Commissioner in terms of section 7(1)(a) of the Act, the point of law ir fact appealed against;
>
> (c) in the case of an award concerning any other dispute, the point of law appealed against; and
>
> (d) the grounds upon which the appeal is based.'

[25] It is important to note that the Labour Court rules and the conciliation and arbitration rules must be read together when determining the procedure to be followed when noting an appeal. This is somewhat confusing, as the following discussion might show, and perhaps consideration should in future be given to create greater harmony between the different sets of rules, or by co-ordinating matters so that both sets of rules do not regulate the same matters.

[26] Be that as it may, it is at least very clear that both the Labour Court rules and the conciliation and arbitration rules provide that the noting of an appeal from an arbitrator's award shall be done in terms of the conciliation and arbitration rules. The 'notice of appeal' must be noted on Form LC41. This form bears the heading 'NOTICE OF APPEAL FROM ARBITRATOR'S AWARD'. A proper reading of rule 17 indicates that, whenever a notice of appeal in respect of an appeal noted against an arbitration tribunal award is referred to, the reference is to Form LC41. In the body of the notice on Form LC41 the following appears (the asterisks apparently indicate that the non-applicable words should be deleted):

> 'Take notice that the Appellant (Complainant*/Respondent* in the above-mentioned arbitration) hereby gives notice of appeal against the entire arbitration award*/part of the arbitration award* issued by Arbitrator _____ on _____ 20___.
>
> The questions of fact (only in the case of a dispute involving the Fundamental Rights and Protections) or law appealed against in the arbitrator's award are as follows:
>
> _____
> _____
> _____
> _____
>
> The grounds of appeal are as follows:
>
> _____
> _____
> _____
> _____
>
> (add additional sheets if necessary)'.

[27] In addition to the notice of appeal as set out in Form LC41, rule 17(3) of the Labour Court rules requires that the appellant must at the time of noting the appeal, (a) complete the relevant parts of Form 11; and (b) deliver the completed Form 11, together with the notice of appeal as set out in Form LC41, to the registrar, the Labour Commissioner and the other parties to the appeal.

[28] Form 11 is a form which is part of the Labour Court rules. It is headed 'NOTICE OF APPEAL' and is divided into two parts. PART A is to be completed by persons noting an appeal in terms of Rule 17(1)(a) or (b)(which is not applicable to the appeal before me). PART B must be completed by all persons noting an appeal in terms of Rule 17(1). Probably because it is to be completed by all appellants in different kinds of appeals, PART B is unfortunately not clear in all respects. Although it is directed at the respondent, which in appeals noted against an arbitration tribunal award, is the other party to the arbitration (see rule 23(3) of the conciliation and arbitration rules), it calls on a person referred to as 'you' to 'despatch to the registrar of the above Court at the High Court ….. within 21days after service upon you of this notice, the record of proceedings relating to the above matter together with such reasons as you are hereby required to give or which you desire to give and to notify the appellant in writing that this has been done.' The 'you' meant here can only be the Labour Commissioner or the labour inspector, who, in appeals noted against an arbitration tribunal award, is not the respondent. Later PART B notifies 'you', who can in this instance only be the respondent (i.e. the opposing party), what steps should be taken in the case of opposition to the appeal.

[29] The Labour Court rules do not define 'deliver' but they do define 'delivery' as service of copies on all parties and filing the original with the registrar'. In the conciliation and arbitration rules the expression 'delivery' is not defined, but 'deliver' is defined as meaning 'serve on other parties and file with the Labour Commissioner and 'file' is defined as 'to lodge with the Labour Commissioner in terms of rule 8' of the conciliation and arbitration rules. However, in my view, unless the context indicates otherwise, the word 'deliver' when used in the Labour Court rules must be interpreted to mean 'serve copies on all parties and file the original with the registrar, and the word 'delivery' when used in the conciliation and arbitration rules must be interpreted to mean 'service on other parties and filing with the Labour Commissioner.'

[30] The rules of the High Court and the Uniform Rules of Court in South Africa also define the word 'deliver' to mean 'serve copies on all parties and file the original with

the registrar'. In regard to this definition the author Erasmus, *Superior Court Practice*, B1-10 states:

> 'Both filing with the registrar and service upon all parties must take place. The usual practice is to require receipt of a copy of a document that has been delivered to be acknowledged on the original by the recipient. The original is filed with the registrar.'

[31] It is indeed the usual practice also in this jurisdiction for the reason that it is practical and efficient. The practice of requiring the parties on whom the copies are served to acknowledge receipt on the original which is then filed with the registrar serves the purpose of ensuring that service and filing, i.e. 'delivery' takes place. Based on the underlying assumption that service takes place before filing, the date of service of the copies is irrelevant because the date of delivery is the date the original is filed.

[32] In this matter the legal practitioner deviated from what is a salutary practice by first filing the original document and then seeking to serve a copy on the respondent. As she forgot to do so, the notice of appeal, although filed, was never 'delivered' in terms of the conciliation and arbitration rules. The appellant is therefore not correct when it states in its supporting affidavit that the notice of appeal was 'duly delivered'. As it was not delivered, it was in fact not 'noted' for purposes of the rules, because rule 23(1)(2) of the conciliation and arbitration rules states that an 'appeal must be noted by delivery….'; and rule 17(3) of the Labour Court rules states that an appeal 'must be noted in terms of the Rules Relating to the Conduct of Conciliation and Arbitration'.

[33] I pause to note that there was no need for the legal practitioner to ensure the presence of the respondent at the address for service. In her affidavit she states that she could not manage to have the notice served at his address as he was not there. Both the conciliation and arbitration rules and the rules of the Labour Court provide that service can take place by registered post to the respondent's postal address, which he provided in Form LC21.

[34] In the present matter the appellant did not comply with rule 17(3)(a) and (b), read with rule 17(4), in that it did not note the appeal properly for three reasons,

namely (i) it did not note the appeal on Form LC41; (ii) it completed both PART A and PART B of Form 11 instead of only completing PART B; and (iii) it did not properly 'deliver' the notice of appeal for two reasons, because (a) the required documents did not include the completed Form 11; and (b) none of the documents were served on the respondent within 30 days of receipt of the arbitrator's award. Of significance is that the application for condonation is only aimed at the one aspect, which is included in (iii)(b) (*supra*), namely that it failed to serve Form 11.

[35] Counsel for the respondent pointed out that, until the morning of the hearing, the appellant had failed to apply for re-instatement of the appeal and for condonation to pursue the appeal out of time and that these defects cannot be remedied by a belated application for condonation occasioned by the respondent's submissions in his heads of argument. I do not agree with this last submission. In principle it is open to a party to apply as soon as it becomes aware of any failure to comply with the rules even if this awareness only dawns after the opposing party has filed its heads. The implications and consequences of the timing of such an application is a matter to be dealt with on the facts of each particular case.

[36] Mr *Muluti* further submitted that the application for condonation was not delivered as soon as it should have been, because the appellant's legal practitioner, by her own admission, failed to read the heads of argument, but merely forwarded them to instructed counsel. He submitted that she was negligent in this regard. These submissions are relevant in the context that an application for condonation should be brought without delay. Should there be a delay, there should also be an acceptable explanation for this (*General Accident Insurance Co SA Ltd v Zampelli* 1988 (4) SA 407 (C) at 411C-E).

[37] I think Mr *Muluti* is correct in his submission that it was instructing counsel's duty to peruse the heads of argument either before sending them to instructed counsel or at least soon enough to provide any instructions which the circumstances may require. It is clear that she did not do so and therefore did not become aware of the defects raised by the respondent until her attention was drawn thereto by instructed counsel on 26 September 2012. There as a delay from 18 to 28 September 2012

when the application was filed, which delay is not long. However, there is no reason given for instructing counsel's remissness.

[38] While there are many aspects about the application for condonation which are unsatisfactory, I do think that it is relevant that the respondent can hardly complain about being prejudiced. Even though I would not go so far as to state that service of the notice of appeal by way of an annexure to the application for stay of the execution cured the lack of service, although still late, it should not be ignored that at least since 3 April 2012 the respondent was aware that the appellant had 'noted' an appeal. The respondent knew the grounds for the appeal, was given notice of the application for a date for hearing, as well as the set down, and received the full record and the heads of argument. The respondent even appeared. It is also relevant to bear in mind that the appeal is not opposed as no notice of opposition to the appeal was filed. The appellant, on the other hand, has much to lose should condonation not be granted.

[39] Bearing these aspects in mind, I turn for the moment to the prospects of success on appeal. Mr *Muluti* submitted that the original grounds of appeal raise questions of fact and not questions of law alone as required by section 89(1)(a) of the Labour Act. At least one of the grounds of appeal is concerned with the interpretation of the contract of employment and its application and as such seems to me to raise a question of law (see *Swarts v Tube-O-Flex Namibia (Pty) Ltd & Another* NLLP 2014(8) 44 LCN at para.[15]).

[40] I do agree with Mr *Muluti*, though, that the appellant did not rely on these grounds at all in its heads of argument, but rather focused entirely on new grounds of appeal not included in the notice of appeal. Nevertheless, the appellant has not expressly abandoned the original grounds of appeal. It merely contends in its application for condonation that it is evident from the contract of employment, which is attached, read with the grounds of appeal that the prospects of success are good. For purposes of this application I agree that the prospects of success on the one valid ground are reasonable. At this stage I must point out again that the appeal was not argued on the merits.

[41] Before making any finding on the application for condonation for the failure to comply with rule 17(4), I prefer to deal with the next issue and to rather consider the matter in the context of the merits of the rest of the application.

The non-compliance with rule 17(25) – failure to prosecute appeal in time

[42] Mr *Muluti* submitted that the appeal has, in any event, also lapsed. Rule 17(25) provides that an appeal 'to which this rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed.'

[43] The word 'day' is defined in section 1 of the Labour Court rules as meaning any calendar day. Section 1 further provides that –

> '(a) when any particular number of days is prescribed for the performance of any act, the same must be reckoned exclusive of the first and inclusive of the last day; and
>
> (b) the last day of any period must be excluded if it falls on a Saturday, Sunday or public holiday;'.

[44] Mr *Muluti* submitted that as Form 11 was served on the Labour Commissioner and filed with the Registrar on 16 December 2011, the period for the prosecution of the appeal lapsed on 27 April 2012. However, when the computation of the period is done on the basis of section 1 of the Act as set out above, it appears that the 90 day period expired on 15 March 2012.

[44] The next problem for the appellant is that no word is stated in the appellant's affidavits about the lapsing or the re-instatement, nor is there any attempt whatsoever to explain and advance any explanation for the failure to prosecute the appeal in time. The only mention of lapsing and re-instatement is in the somewhat tentative wording of prayer 2 of the notice of motion. The application before me only concerns itself with explaining why the notice of appeal was never served and, to some extent, why the notice of appeal was not amended to include the new appeal grounds first raised in the appellant's heads of arguments. The result is that there is

simply no basis laid in the application for re-instatement for the relief sought in prayer 2. No argument was pertinently addressed on this issue.

[45] As stated before, an application condonation for the late prosecution of an appeal and for its re-instatement should provide a full, detailed and satisfactory explanation for the delay. The prospects of success on appeal are also a consideration. The Court must normally objectively consider all the relevant factors and weigh them up. Strong prospects of success may make up for a weak explanation. However, where there is no explanation at all, I have difficulty in comprehending how the application can properly be considered.

[46] In this regard I think I should spell out that, when asking the Court's indulgence to condone non-compliance with the rules it is not sufficient to merely list all the rules that may or may not be involved in the notice of motion and to leave it at that. The applicant must specifically state in the supporting affidavits which rules have not been complied with and in what way. Some rules are quite long and it is not always obvious which part of the rule is at play or in which respect the applicant is, or may be, at fault. If this is not done it is difficult to envisage compliance with the requirement that a full and satisfactory explanation for the default should be given. If the applicant is not sure whether there was non-compliance, but prays for condonation in the event that the Court should find that indeed this was the case, the applicant must still set out the position clearly and nevertheless provide the required explanation as best it can. The uncertainty on the applicant's part does not absolve it of this obligation. I have the impression that frequently applicants ask for a kind of blanket condonation in case they should have done anything wrong or out of time and then leave it for the Court or their opponents to figure out the details, while hoping that all the instances of non-compliance will not be detected. This cannot be countenanced, especially where an indulgence is sought. The applicant must be frank and specific to the point of substance. It should also be remembered that the applicant bears the onus of satisfying the Court that the indulgence should be granted.

The application for leave to amend the grounds of appeal

[47] Strictly speaking it is only necessary for the Court to consider this part of the application if the appeal is re-instated. However, in the circumstances of this particular case I am inclined not to follow a piecemeal approach. I prefer to consider all the parts of the application before making a final decision on any one of the parts.

[48] Rule 17(15) provides that the appellant may within 10 days after the Registrar has made the record available to him or her, by delivery of a notice, amend, add to or vary the terms of the notice of appeal.

[49] The appellant seeks leave to amend and/or to add to the grounds of appeal. It is common cause that it raised several new grounds of appeal for the first time in its heads of argument. The appellant's explanation for doing so is that the managing director, being a layman, did not realize that the arbitrator had erred with regard to where the onus of proof lay and on which party rested the duty to begin to adduce evidence. The managing director could therefore not properly instruct the appellant's lawyers on which grounds of appeal to include in the notice of appeal. It is further explained that the additional grounds of appeal were only discovered when instructed counsel considered the transcribed record while preparing the appellant's heads of argument for the appeal hearing.

[50] The appellant's managing director continues to state in paragraph 33 of his affidavit that he was advised at the time that 'it was thought not to have been necessary to amend or add to the grounds of appeal because there was no indication that the respondent had any intention to oppose this noted appeal and if so, on what grounds as no statement stating the grounds of opposition was delivered in terms of rule 16(b) [it should be 'rule 17(16)(b)'].'

[51] The appellant's managing director further states in paragraph 34 that the appellant has strong prospects of success on appeal on the new grounds raised and 'that the omission to have timeously amended or to have or added (sic) to the grounds of appeal as provided for in rule 15 [it should be 'rule 17(15)'] of the rules of the labour court (*sic*) is not attributed (*sic*) to the applicant/appellant but to the fact that the respondent did not comply with the provisions of rule 11(a) and (b) [it should be 'rule 17(16)(a) and (b)'] of the rules of court.'

[52] This explanation, as far as goes, is most unsatisfactory. The fact that the respondent is not opposing the appeal is no reason for not complying with the rules. Moreover, the attempt by the appellant to place the blame on the respondent is disingenuous.

[53] Quite apart from this, the appellant does not explain why the window of opportunity provided by rule 17(15) was not utilized. This rule expressly provides for a period of 10 days within which an appellant has the chance to amend, add to or vary the notice of appeal once the record becomes available. It is the duty of the appellant's legal practitioners, if not in all cases, at least in cases where legal practitioners are involved who did not represent the appellant at the arbitration, to peruse the record with the intention to determine whether the notice of appeal should be amended in any way, alternatively, to instruct counsel to do so. According to the certificate in terms of rule 17(12), the instructing legal practitioner certified that she perused the record for purposes of rule 17(12). There is, however, no explanation in the application for amendment of the notice of appeal why she did not amend the notice of appeal or why she did not instruct counsel to do so. Furthermore, there is no specific application for condonation for non-compliance with the time period provided in rule 17(15).

[54] The additional grounds of appeal sought to be included in the notice of appeal are set out as follows:

> '[T]he Arbitrator committed gross irregularities by
>
> (a) not having allowed the Respondent as Applicant to commence proceedings despite the Respondent (Applicant then) carrying the duty to begin and the onus of proof.
>
> (b) allowing the Applicant (Respondent then) to be cross-examined regardless of the fact that the Respondent as Applicant has not commenced proceedings and regardless of the fact that the Respondent has not lead (*sic*) any evidence despite carrying the duty to begin and the onus of proof.

(c) Having required of the Applicant/Appellant to begin with the leading of evidence when the Respondent as Applicant then, had the duty to begin and the onus to prove.

(d) Having ruled in favour of the Respondent (Applicant then) without the Respondent having presented any evidence of whatever nature, and despite the fact that the Respondent as Applicant carried the onus of proof and the duty to begin.'

[55] The grounds of appeal are not well formulated and appear to overlap. However, I can make out that the arbitrator is said to have erred on the incidence of proof and the duty to begin, which led her, wrongly, to find for the respondent. Having considered the record, I think the prospects of success on these aspects are good.

Conclusion

[56] Having considered the whole of the appellant's application I am of the view that, while the prospects of success are generally good on at least one ground in the original notice of appeal and on the grounds sought to be added, the deficiencies in motivation for each indulgence sought are so many and where there are in fact explanations, the various explanations for non-compliance are so unsatisfactory that the various indulgences should not be granted.

Costs

[57] Counsel for the respondent submitted that the application is frivolous and vexatious because of the negligence of the instructing legal practitioner and moved for the applications' dismissal with costs on an attorney and client scale. While the legal practitioner was remiss in some respects, at least there were less than perfect attempts to note and prosecute the appeal. I am inclined to hold that the application is not for these reasons deserving of the label attributed to it by respondent's counsel. The result is that no order as to costs will be made.

Order

[58] The result is as follows:

1. The application for condonation, re-instatement of the appeal and for leave to amend the grounds of appeal is dismissed.
2. There shall be no order as to costs.

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K van Niekerk

Judge

APPEARANCE

For the appellant: Adv C J Mouton

Instr. by Francois Erasmus and Partners

For the respondent: Mr Muluti

of Muluti & Partners