REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 42/2014

In the matter between:

SWAKOP URANIUM (PTY) LTD **APPELLANT**

And

HERMAN KALIPA **1ST RESPONDENT**

LABOUR COMMISSIONER **2ND RESPONDENT**

Neutral citation: *Swakop Uranium (Pty) Ltd v Kalipa* (LCA 41-2014) [2015] NALCMD 28 (04 December 2015)

Coram: UNENGU AJ

Heard: **18 September 2015**

Delivered: **04 December 2015**

Flynote: Labour Appeal – Application for condonation of late filing of statement of grounds for opposition – Condonation not granted – Lack of funds to pay legal practitioner to prepare and file statement in time not accepted as good cause for delay – Appeal treated as unopposed and upheld.

Summary: Practice Labour Appeal in terms s 89(1)*(a)* of the Labour Act 11 of 2007 – The appellant lodged an appeal against the arbitration award – The first respondent filed notice of intention to oppose the appeal but delayed in filing the statement with grounds of opposition – The reason for the delay has been given as lack of funds to pay legal fees in order for the legal practitioner to prepare and file the

statement timeously – The application for condonation of the late fling of the statement refused as not sufficient and good cause to justify the delay – The appeal thereafter treated as unopposed and upheld by the court.

ORDER

(i) The application of the first respondent condoning the late filing of his statement opposing the appeal, extending the time upon which he must file the aforementioned statement, ordering the appellant to pay costs of the application; and further and/or alternative relief, is refused.

(ii) The appeal is treated as unopposed and upheld.

JUDGMENT

UNENGU AJ:

[1] In this proceeding, the appellant is appealing against the award of the arbitrator handed down on 17 October 2013 in favour of the first respondent.

[2] The award is being attacked on the following grounds of appeal:

'Ad first ground of appeal

The arbitrator erred in law in finding that, in dismissing the respondent, the appellant did not follow a fair procedure, based on the following:

5.1 The 1st respondent was informed of the charges against him well in advance.

5.2 The 1st respondent was allowed to state his case and to bring witnesses in support of his case at the disciplinary hearing.

5.3 The 1st respondent was allowed to cross- examine witnesses and test the evidence led against her.

5.4 The 1st respondent never raised the unfairness of the disciplinary proceedings at the disciplinary hearing nor in his appeal against the finding of the disciplinary hearing.

5.5 The appellant produced substantive evidence that the dismissal of the 1st respondent was fair and justified, on a balance of probabilities.'

Ad second ground of appeal

2. The arbitrator erred in law in finding that the respondent is entitled to six month's salary in the amount N$171 000.00 as compensated in respect of loss of income.

2.1 no evidence was presented at the hearing the 1st respondent actually suffered losses o fN$171 000.00 as a result of his dismissal.

2.2 the appellant was not given an opportunity to give evidence regarding the 1st respondent's loss of income or to cross-examine the 1st respondent as to the correctness of the information which the arbitrator used in awarding compensation in the amount of N$171 000.00.

3. In the circumstances, the correct award, based on the grounds referred to above, would have been an award upholding and confirming the dismissal of the 1st respondent as fair in the circumstances.'

[3] The notice to appeal the award was filed with the Office of the Registrar on 20 August 2014, the date on which the notice was also filed on A Vatilifa on behalf of the Office of the Labour Commissioner.

[4] However, it is not clear when the first respondent received the notice of appeal. In his founding affidavit supporting the notice of motion condoning the late filing of the first respondent's statement of opposition of the appeal, the extension of time upon which the first respondent must file the statement and other ancillary relief, Mr Aingura, the legal practitioner for the first respondent in para 7 thereof states that

the notice of appeal was served upon the first respondent in August 2014 already. It is possible because the notice of intention to oppose the appeal was field at the Office of the Registrar on 10 September 2014 and served on the Office of the Labour Commissioner on the same date at 14:23.

[5] All these happened when the first respondent who was an employee of Swakop Uranium (Pty) Ltd was charged with and found guilty of misconduct offences of insubordination, refusing reasonable instructions, unauthorised use of company vehicle and misuse or abuse of company property and absent without permission, amongst others, in a disciplinary hearing. He was dismissed from employment, appealed against his dismissal internally but was unsuccessful. His dismissal was confirmed by the internal appeal body.

[6] Still not happy with the outcome of the internal appeal, the first respondent referred the matter to the Office of the Labour Commissioner for conciliation and arbitration as a dispute of unfair dismissal.

[7] The Labour Commissioner, on 6 March 2014, by letter informed the parties that the matter was set down for arbitration hearing before Ms Kyllikki Sihlahla as an arbitrator on 15 April 2014 at 09h00. Ms Sihlahla concluded the arbitration proceedings on 20 June 2014 and delivered the award on 24 July 2014 in favour of the first respondent, in the following terms:

> ‘AWARD
>
> Having considered the evidence and arguments of the parties and having made findings stated herein above, I accordingly make the following order that:
>
> 1. I found that the dismissal of Applicant was both substantively and procedurally unfair;
> 2. The Respondent must pay compensation to the Applicant in the amount of One Hundred and Seventy One Thousand Namibian Dollars (N$171 000.00) being the monthly salary of N$28 000.00 x 6 months, on or before 5 August 2012;

3. The Respondent must permit the Applicant to collect his personal belongings from its premises on 29 August 2014;

4. The above-mentioned amount attracts interests in terms of section 87(2) of the Namibian Labour Act from the date of the Award; and

5. In the circumstances of the case, I have not made an order of costs.

The Arbitrator Award is final and binding on both parties hereto and may be filed with the Labour Court by any interested party in accordance with Section 87 of the Labour Act (Act 11 of 2007) to be made a court order.

Signed at **Windhoek** on the **24 July 2014**.

KYLLIKKI T.N.N. SIHLAHLA **……..**
ARBITRATOR **SIGNATURE ’**

[8] Before me during the appeal hearing Mr Daniels appeared for the appellant and Mr Phatela on behalf of the first respondent. But before counsel could argue the appeal, Mr Phatela for the first respondent indicated that there was an application for condonation for the late filing of the applicant’s statement of opposition of the appeal, extending the time upon which the first respondent must file the statement of appeal to 16 January 2015 and an costs order against the appellant in the event they oppose the application.

[9] The application in question was filed with the Office of the Registrar on 19 January 2015, at 10h40 when the appeal hearing was to start at 09h00 on 23 January 2015. The statement of the grounds was supposed to be filed already on or before 8 October 2914 to apprise the appellant well in advance of the grounds of opposition and prepare its heads of argument accordingly, in case they opted to oppose the application or to inform the first respondent beforehand that his application for condonation of the late filing of the grounds of opposition would not be opposed.

[10] Rule 17(16)*(b)* states the period within which the statement of grounds of opposition to an appeal should be filed. The relevant part thereof reads:

'16 Should any person to whom the notice to appeal is delivered wish to oppose the appeal, he or she must –

(a) ……..

(b) *within 21 days after receipt by him or her of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice of oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.'* (My underlining).

[11] The statement of the grounds of opposition to an appeal is not only an important antecedent to inform the appellant on what grounds the appeal would be resisted by the respondent but also important for the appellant to apply to the registrar to assign a date for the hearing of the appeal and set the matter down for hearing of the appeal. In the present appeal, the date for hearing of the appeal was assigned and set down by the registrar without the grounds of opposition being furnished and on the same basis as if the appeal was unopposed. The first respondent knows very well that his participation in the hearing of the appeal is depended solely on the granting of the application for condonation by the court. Should the court decline to grant the application, the first respondent will be excluded from the hearing and the appeal will be heard unopposed. Therefore, the first respondent must persuade the court not to exclude him from the proceedings through a detailed and acceptable explanation for the delay.

[12] In his affidavit, in para 11 thereof, the last sentence on p 8, Mr Simson Aingura, the legal practitioner for the respondent stated that '*The purpose of his application (condonation) is consequently, to obtain such condonation to enable the applicant herein to fully participate at the hearing of this appeal set down for 23 January 2015'.* Mr Aingura sets out in the affidavit how he had advised the respondent the way forward and requested the respondent to put him into funds in order for him to do something. This dialogue went on and on for an extended period

of time between them. Mr Aingura, at one stage, threatened to withdraw as first respondent's legal practitioner. On his part, the respondent, did very little, if any, to put his legal practitioner into funds so that he could draft the grounds of opposition.

[13] The remissness on the part of the first respondent, in my opinion, caused serious prejudice to the appellant. According to Mr Shikongo, he has to travel from Swakopmund to Windhoek urgently, as a result of short notice, to come and see his legal practitioner to draft the answering affidavit to the application for condonation filed by the respondent.

[14] In view of the absence of the grounds of opposition from the first respondent, I might not be wrong to say that the appellant was under the impression that the appeal will not be opposed. The appellant is correct, that they were unable to prepare proper heads of argument because they were not provided with grounds of opposition. A failure to comply with the peremptory provisions of rule 17(16) *(a)-(b)* is fatal and has the effect of excluding the non-compliant party form participating in the proceedings.

[15] It is appropriate at this juncture to mention that the fact that I have allowed Mr Phatela, to participate in the hearing of the appeal, should not be seen that by so doing, I have condoned the non-compliance with rule 17(16) and that, as such, the application for condonation for the late filing of the grounds of opposition has been granted. No. The respondent has to give a reasonable and acceptable explanation for the late filing of the statement containing the grounds of opposition. He is presumably relying on the provisions of rule 15 which deals with the non-compliance with rules. Nonetheless, the respondent has a duty, as mentioned above to provide sufficient cause for excusing him from compliance.

[16] In *Saloojee NNO v Minister of Community Development*[1] it is said:

'It is necessary once again to emphasise, as was done in *Meintjies v H.D. Combrinck (Edms) Bpk* 1961 (1) SA 262 (AD) at 264, that condonation of the non-observance of the

[1] 1965 (2) SA 135 (A) at 138E-H.

Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration . . . . What calls for some acceptable explanation is not only the delay in noting the appeal and in lodging the record timeously, but also the delay in seeking the condonation.'

[17] Similarly, in *Arangies tla Auto Tech v Quick Build*[2] O'Regan AJA stated the following with regard applications for condonation:

'The application for condonation must thus be lodged without delay, and must provide a "full, detailed and accurate" explanation for it.[3] This court has also recently reconsidered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –

"the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice, suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."[4]

These factors are not individually determinative, but must be weighed, one against the other.[5] There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been 'glaring', 'flagrant' and 'inexplicable'.'

[18] The question is, did the first respondent in this application lodge his application for condonation without delay and provided a full, detailed and accurate explanation? I do not think so. Lack of funds to pay fees of the legal practitioner in order for the latter to draft the pleadings in my view, cannot justify the non-observance of the rules – nor can it be accepted by the court as sufficient and a detailed cause for the delay in seeking condonation.

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[2] 2014 (1) NR 187 (SC) at 189-190E-B.

[19] Gibson J in *Indigo Sky Gem (Pty) Ltd v Johnston*[3], struck the matter from roll because heads of argument were not filed by counsel timeously and said the following:

'The crux of the matter is that there appears to have been a flagrant breach of the Rules of Court. Given that course of conduct, my attitude is that the court can only ignore such attitude at its peril and to its own prejudice in the running and administration of the court's business. Thus my view is that such failure cannot be overlooked in the circumstances of this case because to do so would encourage laxity in the preparation of court pleadings. If rules are only to be followed when a legal practitioner sees fit to do so, then the Rules may as well be torn up.' (Emphasis).

[20] I endorse the principles laid down by Gibson J in the *Indigo Sky Gem* and cases cited above. In fact laxity in the timely preparation of court pleadings is a reality nowadays judging from the many applications for condonation of non-compliance with the rules, serving before courts. In the present appeal though, the legal practitioner cannot be blamed for the delay. The first respondent self is. It is not that he was not properly advised by his legal practitioner about the timeline within which to file the statement. He was also fully and properly informed about the importance of him obtaining money as soon as possible for the statement with grounds of opposition to be prepared and filed. The warnings of Mr Aingura fell on death ears of the first respondent.

[21] In this instance I also wish to refer to the case of *Swanepoel v Marais and Others*[4] where Levy J reiterated the warning already sounded in many cases including those he referred to in the *Swanepoel* matter when he said the following:

'The Rules of court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been

[3] 1997 NR 239 (HC).
[4] 1992 NR 1.

designed for that purpose, be complied. Practice and procedure in the courts can be completely dislocated by non-compliance.'

He further referred to the case of *Ferreira v Ntshingila* 1990 (4) SA (271) (A) at 218G where the following was said:

'As far as the prospects of success on appeal are concerned, the appeal in the present matter would not be without merit. However, where the non-observance of the Rules has been as flagrant and as gross as in the present case, the application should not be granted, whatever the prospects of success might be.'

[22] The principle above, in my view, is applicable in the present appeal.

[23] I mentioned already and shall repeat it again that the first respondent was not concerned about the time within which to file the grounds for opposing the appeal. This is apparent from his conduct when he failed to look for money somewhere else to pay his legal practitioner while the family was searching for funds to assist him. Instead of looking for help elsewhere, the first respondent, waited until the family had gathered funds after the period of almost three months. The delay is due to the first respondent's own ineptitude – non other than himself is to blame for the failure which caused inconvenience to the appellant and the court. This is nothing other than a flagrant non-observance of the rules without a good excuse.

[24] Mr Phatela counsel for the first respondent argued that rules 17(6) and rule 17(16)*(b)* compliment one another. According to him, the first respondent is entitled in law (through rule 17(6)) to come and appear before court whether the statement with grounds of opposition (rule 17(16)*(b)* has been filed or not. He argued further that rule 17(16)*(b)* does not prescribe consequences of non-compliance with the rule. With due respect to counsel, his submission cannot be correct.

[25] If counsel is correct that the statement in terms of rule 17(16)*(b)* is not necessary because the first respondent can still appear and be heard. Why bothering the court then with an application for condonation of the late filing of the

statement containing the grounds of opposition? Rule 17(16)*(b)* is mandatory, the first respondent does not have a discretion to deliver or not to deliver the statement stating the grounds on which he opposes the appeal.

[26] The first respondent is obliged in terms of Rule 17(16)*(b)* to deliver the statement stating the grounds on which he opposes the appeal which grounds must inform the arbitrator, the appellant and this court of the grounds on which the arbitration award is been attacked and which the first respondent supports. (See *Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 at 288D).

[27] With regard the argument of Mr Phatela that there are no consequences prescribed for the non-compliance with rule 17(16)*(b)* I advise counsel to read rule 17(16)*(b)* together with rule 15 which grants the Labour Court powers to condone any non-compliance with the rules, extend or abridge any period prescribed by the rules whether before or after the expiry of such period – on application and on good cause shown. If no good cause is shown by the applicant for the non-compliance, the consequence thereof will be refusal of the application.

[28] In the matter of *Leweis v Sampolo*, Strydom CJ defined good cause as follows:

> 'Although the Courts have studiously refrained from attempting an exhaustive definition of the words ''good cause" they have laid down what an applicant should do to comply with such requirement. In this regard it is stated that an applicant:
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> (a) must give a reasonable explanation for his default;
> (b) the application must be *bona fide*; and
> (c) the applicant must show that he has a *bona fide* defence to the plaintiff's case.'

[29] In the instant matter, as pointed out before, the first respondent did not show good cause to justify the grant of the indulgence he had applied for. Therefore, condonation for the non-compliance with rule 17(16)*(b)* is refused.

[30] Seeing that I have declined to condone the non-compliance with rule 17(16) *(b)* resulting in the application being refused, there is therefore no reason why the appellant should not succeed in his appeal. In my view the appeal is unopposed and as such should be upheld.

[31] In the result, the following orders are made:

(i) The application of the first respondent condoning the late filing of his statement opposing the appeal, extending the time upon which he must file the aforementioned statement, ordering the appellant to pay costs of the application; and further and/or alternative relief, is refused.

(ii) The appeal is treated as unopposed and upheld.

P E UNENGU

Acting Judge

APPEARANCES

APPELLANT:	C Daniels of Clement Daniels Attorneys, Windhoek
1ST RESPONDENT:	T C Phatela Instructed by Aingura Legal Practitioners c/o LorentzAngula Inc. Windhoek