

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON APPLICATION FOR CONDONATION

CASE NO. LC 170/2015

In the matter between:

WILLIE !OWISEB

APPLICANT

and

TRANSNAMIB HOLDINGS LTD

RESPONDENT

Neutral Citation: *!Owoseb // Transnamib Holdings Ltd* (LC 170/2015)
[2018] NALCMD 4 (23 March 2018)

CORAM: MASUKU J

Heard: 9 March 2018

Delivered: 23 March 2018

Flynote: Practice – Application for condonation for non-compliance with provisions of the Labour Act – Requirements for success discussed – Legal Ethics – The inadvisability of instructing newly admitted legal practitioners to appear in hearing of condonation applications which are complicated or have serious consequences for the client.

Summary: The applicant filed an application for condonation for failure to file a record of proceedings and for failure to prosecute the appeal on time. The applicant was represented by a newly admitted legal practitioner in the matter.

Held – an application for condonation has to show that there is a reasonable and acceptable explanation for the non-compliance and that the applicant has prospects of success on the appeal. However, if the delay is egregious, or the explanation for the delay is unconvincing, the court may dismiss the application.

Held further that – the applicant failed to advance a reasonable explanation for the default and further waited for an inordinately long time to bring the condonation application such that a period, in the excess of three years had elapsed, thus rendering it unjust to grant the application, in the circumstances.

Held – that the applicant's legal practitioners, together with the applicant were inactive for too long such that this was a proper case in which the applicant's legal practitioner's sins should be visited on the applicant.

Held further – that newly admitted legal practitioners should not be thrown into the deep end of the pool by being called upon to deal with complicated matters or those in which there is an inordinate delay in the bringing the proceedings as that has the potential to affect the legal practitioner's esteem and confidence for life and is also unfair on the litigant, who, in those precarious circumstances, needs the best possible representation.

The application was dismissed with costs and on account of the applicant's legal practitioners' admitted remissness, the court ordered that the client should not be billed for the attendances in relation to the matter.

ORDER

1. The applicant's application for condonation is hereby dismissed.

2. There shall be no order as to costs.
3. The applicant's legal practitioners are not liable to charge the applicant for fees in respect of this matter.
4. The matter is removed from the roll and is regarded as finalised.

REASONS

MASUKU J,;

Introduction

[1] On 9 March 2018, after listening to oral argument presented on behalf of the parties, I granted an order dismissing the applicant's application and made no order as to costs. I undertook to deliver reasons for the order I made. Those reasons follow below.

Nature of application

[2] Presently serving for determination before this court is an opposed interlocutory application for condonation of the applicant's failure to comply with the certain provisions of the Labour Act.¹ I shall advert more fully to the relevant provisions as the ruling unfolds.

Background

[3] The applicant is a Namibian male adult who was in the employ of the respondent as a train driver for a considerable period of time. The applicant was hauled before a disciplinary committee of respondent for certain acts of misconduct arising from a train accident which caused the loss of a life and considerable damages to the respondent. The said committee found the

¹ Act No. 11 of 2007.

applicant guilty and as a result of which he was dismissed from the respondent's employ.

[4] On 24 April 2014, the applicant referred a dispute of unfair dismissal to the office of the Labour Commissioner. A referral of the matter to conciliation did not bear fruit, resulting in the matter being referred to arbitration. The said arbitration proceedings were finalised on 19 September 2015 but the arbitrator failed to issue the award within the 30-day period, which is prescribed by statute. By the consent of both parties, the arbitrator was accordingly allowed a further period for the arbitrator to issue same.

[5] On 30 June 2015, the arbitrator issued the award, culminating in the applicant lodging an appeal against the said arbitral award on 30 July 2015. After noting the appeal, the applicant states that he did not receive the record of proceedings from the arbitrator, in order to transmit same to the Registrar of this Court. This should have been done within 21 days of the issue of the arbitral award.

[6] In view of the arbitrator's failure to lodge the record, the applicant's legal practitioners of record state that they contacted the arbitrator, requesting the dispatch of same in or about August 2015 but the arbitrator indicated that the record was not ready for dispatch. Further written enquiries followed in September 2015 but the record would still not be delivered because, according to the arbitrator, the record was still with the transcribers. This back and forth between the applicant's legal practitioners and the arbitrator continued until the time for lodging the period expired.

[7] The applicant's legal practitioner states that he operated under the misapprehension that in terms of the law, the record was due on 30 November 2015, when in actual fact, this should have been done on 30 October 2015. This error, he realised on 20 November 2015 and it was on that basis that the order sought was made. He denied any intentional disregard of the relevant law on his part and stated that the delay on his part was as a result of an honest mistake and prayed that his remissness in not

filing the necessary application on time should not be visited on the applicant. The delay for the submission of the record, was placed at the door of the arbitrator.

[8] The deponent to the application stated that the applicant enjoyed bright prospects of success and submitted in that regard that the arbitrator applied the wrong onus in the arbitral award and held that the applicant had failed to prove that his dismissal was unfair, contrary to the provisions of s. 33 (4) of the Act, which places the onus on the employer rather than the employee. Another reason advanced regarding the prospects of success, was that the applicant had complained about the fairness and impartiality of the chairperson of the disciplinary process that found him culpable, who it was claimed, had prior knowledge of the issues as he had been part of the persons who conducted an investigation into how the train accident had occurred.

[9] It was further submitted that the respondent had breached its own disciplinary code as on appeal the Chief Executive Officer or the Chief Industrial Relations Officer. In this regard, it was argued that only one person authored and signed the dismissal of the applicant's appeal. It was further alleged that the arbitrator failed to properly weigh all the evidence at his disposal and that there was no proper basis to find that the applicant's dismissal was fair. On the basis of the foregoing, the applicant claimed that he has prospects of success on appeal.

[10] It must be mentioned that this was not the applicant's only infraction. On 20 November 2017, he filed an amended notice of motion, based on a founding affidavit deposed to by his legal practitioner of record and in which he claimed the following relief:

1. An order condoning applicant's non-compliance with the provisions of Rule 17 (13) of the Rules of the Labour Court;

2. An order for Reinstatement of the lapsed appeal under case number 170/2015.

3. Costs of suit.

4. Further and/or alternative relief.

Alternatively

5. Extending the period within which to prosecute the appeal.

6. Further and/or alternative relief.'

[11] I must mention that the affidavit filed in support of the new application, is a replica of the last affidavit, with very little material differences. In particular, there does not appear to be any new material supplied as to why there has, since the last non-compliance, been another non-compliance; how that came about and the reasons why the court should condone the latest non-compliance. As indicated, the new affidavit is a rehash of the last one for the most part.

[12] The one new issue raised, is to be found in paragraph 15, where the deponent states that a dismissal was not an appropriate sanction in the circumstances. In this regard, it was stated that the respondent did not lead any evidence to testify about the gravity of the applicant's conduct complained of. It was also, for the first time, alleged, that the applicant had worked for a period of 24 years for the respondent and that in those circumstances, his otherwise unblemished record should have stood him in good stead, neither was it shown, do the allegations further went, that the relationship between the applicant and his employer had so deteriorated that dismissal was the only option. It was, on the basis of the foregoing, alleged that the applicant has bright prospects of success and that the orders sought should be granted as prayed.

[13] It was finally deposed that the reason for the lapsing of the appeal was due to the failure of the Labour Commissioner to dispatch the record in time,

together with 'the negligence of his legal practitioner. It is respectfully submitted that this (*sic*) not a case where the applicant cannot hide behind the negligence of the legal practitioner. It is respectfully submitted that it will be in the interests of justice if the appeal is re-instated and/or re-enrolled.'²

[14] The million-dollar question is whether the applicant is entitled to the orders he seeks. In order to come to a determination of that very important question, it is, in my view, important to first have regard to case law to ascertain what requirements the applicant must fulfil in order to get a favourable order in that regard. That is what I intend doing in the paragraphs below.

The law on condonation

[15] There is a plethora of decisions in this jurisdiction on this subject, both at the Supreme Court level and in this court as well. In *Beaukes and Another v South West Africa Building Society (SWABOU) and Others*,³ the Supreme Court expressed itself as follows on this subject:

[5] The application for condonation must thus be lodged without delay, and must provide a "full, detailed and accurate" explanation for it. This court has also recently considered 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; prejudice suffered by other litigants as a result of the non-compliance, the inconvenience of the court and the avoidance of unnecessary delay in the administration of justice.' See also *Petrus v Roman Catholic Archdiocese*.⁴

² Para 16 of the Founding Affidavit.

³ (SA/10/2006) [2010] NASC 14 (5 November 2010).

⁴ 2011 (2) NR 637 (SC).

[16] How does the applicant fare, regarding the issues pointed out by the Supreme Court as decisive in such applications? Mr. Philander submitted that there was nothing at all to be said in favour of the applicant in this matter. I will enumerate some of the reasons for his submission. Ms. McLeod, for the applicant, had nothing of consequence to say, or to sway the court away from the paths of dismissal that Mr Philander, in his compelling argument, advocated for. I will return to the applicant's legal practitioner as the tail end of the judgment.

The explanation

[17] The applicant alleges that his legal practitioner committed an error in computing the period during which the appeal would lapse. In the lawyer's own words, which I borrow, he was guilty of remissness. He said, '. . . I pray that the Honourable Court does not punish the applicant for my remissness'.⁵ Properly understood, this means an attitude that, 'relaxed, languid, negligent'. That is a confession from the mouth of the applicant's lawyer, which this court is asked not to punish. Can that be correct?

[18] I must mention that this application was not pursued with the vigour that it naturally deserved. I say so, for the reason that there was, as is evident, a further non-compliance by the applicant which resulted in the applicant filing an amended notice of motion, accompanied by another affidavit by the applicant's legal practitioner. This application was for condonation of the non-compliance with Rule 17(13) of the Labour Court Rules, coupled with a prayer for the reinstatement of the lapsed appeal.

[19] This latter application, it must be mentioned, was brought a whopping 13 months after the first application. In this regard, it must be pertinently mentioned that the first application had not been prosecuted when the amended notice of motion was brought. The legal practitioner stated that the latter application came about as a lack of diligence on his part.

⁵ Para 8 of the Founding Affidavit 24 November 2015.

[20] The natural question that follows is whether it can be said in favour of the application that there is a *bona fide* and reasonable explanation for the two defaults, necessitating the filing of two separate notices of motion and affidavits? In this connection, the applicant's legal practitioner seeks to play the sympathy card, by seeking to deflect the attention from the applicant to the lawyers, arguing that the court should not punish the applicant for the misdeeds of his legal practitioner.

[21] In appropriate cases, this is a sound and commendable approach. The pertinent question, however, is whether this is a proper case in which the applicant must suffer for the lack of his legal practitioner's diligence and negligence. Put differently, is this not a proper case in which the sins of the lawyer should be visited on the client?

[22] I am of the firm view that the sins of the applicant's lawyer are a multitude. He was not content with only committing one cardinal sin. He was guilty of committing a second default, which as indicated earlier, required him to file a further affidavit seeking further relief. In the circumstances, the explanations are not convincing. No cogent reason is given as to why the appeal was allowed to lapse as it did, right under the applicant's lawyer's watch as it were. One lapse is bad enough, but two, are just too many, in my considered view.

[23] In *Saloojee and Another v Minister of Community Development*⁶ the court expressed itself in the following manner, regarding the effect of a lawyer's lack of diligence on the client:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the sufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the rules of this Court. Considerations *ad misericordiam* should not be allowed become an invitation to laxity.'

⁶ 1965 (2) SA 135 (AD) at 141 C-E.

[24] I fully embrace these remarks and am of the considered view that this is a proper case where the attorney's sins cannot be atoned for by the client's lack of culpability. The client should in this case, unfortunately, have to live with the consequences of the legal practitioner's admitted inattention and lack of diligence.

Delay in lodging the application

[25] As indicated above, there were two serious lapses by the applicant's legal practitioner. In the *Beukes* case, the court stated unequivocally that applications for condonation should be brought as soon and without delay. In this case, this case comes almost four years after the dismissal of the applicant. Should the respondent have waited all this while for the applicant to act? I do not think so. The respondent was fully entitled to get on with its life and to run its business knowing that the applicant is no longer part of its employ. It appears to me eminently unfair that the applicant seeks at this late stage to upset the apple cart as it were.

[26] Finality is much needed in this case, otherwise, the interests of justice suffer when cases remain open for prolonged periods of time, leaving people's rights to decide and plan for the future in limbo, as it were. I am of the view that granting the application at this very late stage, almost four years after the effect, would be clearly prejudicial to the respondent and would cause an unnecessary headache for it and one that could have been easily avoided by the applicant going about his business in a conscientious and timeous manner. On this score, the applicant must fail.

[27] In this regard, I am of the view that the non-compliance with the rules has been clearly glaring, flagrant and inexplicable, warranting that the court should not even venture to deal with the issue of the prospects of success as the explanations are woefully inadequate and the time allowed to pass has created a highly prejudicial situation for the respondent if the matter was to proceed and was to be determined in the applicant's favour.⁷ The behaviour of

⁷ *Beukes and Another v SWABOU (supra)*.

the applicant and/or his legal practitioner was simply unpretentious and therefore inexcusable in the circumstances.

[28] In *I A Bell Equipment Co Namibia (Pty) Ltd v E S Smith Concrete Industries CC*,⁸ in dealing with the issue of condonation and the need to avoid delay, the court referred to the judgment of Kotze JP, in *Unitrans Swaziland Limited v Inyatsi Construction Limited*,⁹ where the learned Judge President reasoned as follows:

‘The courts have often held that whenever a prospective appellant realises that he has not complied with a Rule of Court, he should, apart from remedying his fault immediately, also apply for condonation without delay.’

This, it is evident, from what has been previously mentioned in this judgment, the applicant simply did not do.

[29] I take note that the applicant chose to say nothing for himself in this entire imbroglio. He chose to maintain his peace. He does not, for example, say on oath what he did when the matter dragged so long without an end in sight. I am of the view that the applicant is *in pari delicto* (equally guilty) with his lawyer, because he has a duty to press for developments on his case. He cannot be allowed to simply fold his arms and do nothing for months on end, with no progress report on the further conduct of the matter from his legal representative. He and his legal practitioners appear to have made their bed jointly and they must, for that reason, lie on it, jointly and severally.

The performance of the applicant’s legal practitioner at the hearing

[30] Just before the application could be heard, a call was made on my chambers by both legal practitioners, to introduce Ms. McLeod, for the applicant, who was making her maiden appearance before me. When the parties started crossing swords, I immediately noticed that the applicant’s

⁸ (I 1860/2014) [2015] NAHCMD 68 (23 March 2015).

⁹ [1997] SZSC 41 at p.11.

legal practitioner had been thrown into the deep end of the pool - as deep as the blue sea and therefor, bottomless and unfortunately, it would seem, apparently without a life jacket. She was completely unnerved and failed to make any useful arguments in her client's favour. For that, I lay no blame on her whatsoever and actually praise her for her fortitude in such volatile conditions.

[31] I also formed the distinct impression that she had not been allowed sufficient time to prepare and to be acquainted with the matter and to perform her duty to court accordingly. In my assessment, which I hope is wrong, she may have been given the file that very morning, to go and do her 'best' of a terrible situation. She appeared not to be *au fait* with the matter, the facts and the law applicable, something of grave concern to me.

[32] Such a situation is completely out of order and is, more importantly, unfair, particularly to a newly admitted legal practitioner. I say so because this may serve to break her confidence and self-esteem as a legal practitioner, and from which precipice, she may never recover for her entire professional life. Young legal practitioners are precious assets for the future and must be handled with sensitivity and with extreme care. They should not be allowed to go into the ring and where they will be expected to punch above their weight, in boxing parlance.

[33] Furthermore, the decision to send a newly admitted legal practitioner to handle such a sensitive and seriously mishandled case, is very unfair to the applicant. Instead of the senior legal practitioners in the law firm going to mop up and explain their remissness and to give this matter proper attention and their the best shot by preparing the most senior to argue the matter, they instructed the young and inexperienced legal practitioner to literally go and swim against the waves at high tide. I take a very dim view of this practice and I shall make an appropriate order in this regard when I deal with the issue of costs below.

Disposal

[34] In the premises, I am of the considered view that the applicant has not succeeded in making a case for the relief sought. His legal practitioners' handling of the matter, and to some extent, his own inaction, literally shut the court's doors on his face and I cannot, no matter how much I may sympathise with the applicant, find in his favour. His case has, from what I have said above, been dealt a decisively fatal blow and has thus been rendered irredeemable in my considered view, by his legal practitioners.

Order

[35] In view of the foregoing findings and conclusions, I accordingly make the following order:

1. The applicant's application for condonation is hereby dismissed.
2. There shall be no order as to costs.
3. The applicant's legal practitioners are not liable to charge the applicant for fees in respect of this matter.
4. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge

APPEARANCE:

APPLICANT: McLeod
Instructed by: Tjitemisa & Associates

RESPONDENT: R. Philander
Instructed by: ENSAfrica|Namibia