

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION

RULING

CASE NO: HC-MD-LAB-MOT-GEN-2019/00199

In the matter between:

**THE MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

APPELLANT/APPLICANT

and

AMUTENYA JOSEPH AMUTENYA

1ST RESPONDENT

THE LABOUR COMMISSIONER

2ND RESPONDENT

PHILLIP MWANDINGI N.O.

3RD RESPONDENT

Neutral Citation: *Minister of International Relations and Co-Operation v Amutenya* (HC-MD-LAB-MOT-GEN-2019/00199) [2020] NALCMD 4 (20 February 2020)

CORAM: MASUKU J

Heard: 30 January 2020

Delivered: 20 February 2020

Flynote: Labour Law – appeal from award of arbitrator – condonation for failure to prosecute appeal within time limits – considerations courts take into account in deciding application for condonation – Civil Procedure – *lis alibi* - whether court can dismiss an application on basis of the plea of *lis alibi*

pendens – function of affidavits in applications – impermissibility of including legal argument and quotations from judgments in affidavits.

Summary: The applicant, the Minister of International Relations and Co-operation filed an application for condonation for the failure to prosecute an appeal within the time limits prescribed. The application was opposed by the respondent. The respondent had been employed by the Ministry as a member of Staff in Foreign Service and upon reaching retirement age, he applied for retention post-retirement. His application was unsuccessful and he launched proceedings before the Labour Commissioner as a result of his grievance. The Minister failed, however, to prosecute the appeal within the time limits provided in law and accordingly filed an application for condonation of the late prosecution of the appeal and reinstatement of the appeal as it had been deemed to have been abandoned by operation of law.

Held – that in applications for condonation, an applicant therefor must advance a reasonable explanation for the delay and also show that he or she has reasonable prospects of success on appeal.

Held that: in determining the success or otherwise of the application, the court considers a number of factors including a reasonable explanation for the delay, which must be full, detailed and accurate; the degree of the delay; the prospects of success; the convenience of the court; the importance of the case; the respondent's interest in the finality of the case and any prejudice the respondent may suffer.

Held further that: the applicant's legal practitioner gave a reasonable explanation for the delay and that the matter is of importance as it relates to the interpretation of the law regarding retention of staff members after retirement.

Held: that the applicant has prospects of success considering that the arbitrator made a decision to compensate the applicant, effectively allowing

the retention of the respondent when that decision could only be made by the Prime Minister on recommendation by the Public Service.

Held that: a plea of *lis alibi pendens* does not result in a court dismissing one or the other proceeding. Its effect is to stay one of the pending proceedings.

Held further that: affidavits constitute the evidence and the pleading in application proceedings. It is thus improper for parties to include argument in affidavits and quoting cases and the excerpts therefrom.

The application was granted with costs, which the applicant had tendered.

ORDER

1. The Applicant's non-compliance with the Rules of the Labour Court is hereby condoned.
2. The appeal noted under Case No: HC-MDLAB-APP-AAA-2018/00060 is hereby reinstated onto the roll.
3. The Applicant is ordered to pay the costs of the First Respondent occasioned by this application, including the costs incurred by him in opposing the initial application under Case No: HC-MDLAB-APP-AAA-2018/00060.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The law relating to applications for condonation, is fairly settled in this jurisdiction. The question confronting the court, and crying out for determination, in this opposed application, is whether the applicant has met the requisites for the granting of the order.

The parties

[2] The applicant is the Minister for International Relations and Co-Operation. She is duly represented by the Office of the Government Attorney, whose offices are situate at 2nd Floor, Sanlam Centre Windhoek. The applicant shall be referred to as such, or simply as 'the Minister'.

[3] The 1st respondent, is Mr. Amutenya Joseph Amutenya, an adult Namibian male. He is a resident of Windhoek. He will be referred to in this judgment as the respondent, unless the context requires the precise mention of another respondent cited in the proceedings.

[4] The 2nd respondent is the Labour Commissioner, an office established in terms of the Labour Act, 2007. No relief is sought against this respondent, who has been served merely for formal purposes only. The 3rd respondent is Mr. Phillip Mwandangi *N.O.*, a Namibian male adult who is cited in his capacity as the arbitrator, who was appointed by the 2nd respondent to preside over a dispute lodged by the 1st respondent against the Minister. No relief is sought against the other respondents, save the 1st respondent.

Relief sought

[5] As foreshadowed in the opening paragraph of this ruling, the applicant has approached this court essentially seeking an order for condonation of her late noting of an appeal against an award issued by the 3rd respondent. The relief sought by the Minister, is couched in the following terms:

- '1. Condoning the Applicants non-compliance with the Rules of the Labour Court;
2. Re-instating the labour appeal filed by the Applicant under case number

HC-MD-LAB-APP-AAA-2018/00060;

3. Granting the Applicant leave to take further steps in the prosecution of the appeal;
4. That the appeal must be prosecuted to finality within 40 days of the order
5. Costs of suit (if opposed)
6. Further and/or alternative relief.'

Background

[6] The facts giving rise to the present application, are fairly straightforward and are not the subject of much contestation. They acuminate to this: the respondent was in the employ of the applicant's Ministry and had been posted for Foreign Service in Vienna, Austria, as the Second Secretary. When time neared for him to retire, in terms of the relevant regulations of the Public Service, the respondent lodged an application to the parent Ministry, supported by the Ambassador, for an extension of his retirement by a period of two years.

[7] This application, it is common cause, did not receive a favourable consideration and outcome from the Minister. The respondent received the bad tidings and understandably was not enamoured by the decision, which indicated that another person had already been appointed to replace him. He approached the Office of the 2nd respondent where he lodged a dispute of an unfair labour practice.

[8] After the dispute was unresolved at conciliation, the matter was referred by the 2nd respondent to arbitration, where it served before the 3rd respondent. In an award dated 30 October 2018, the 3rd respondent found for the respondent. In his award, the 3rd respondent, in particular found that the omission by the applicant's Permanent Secretary, at the time, to forward the respondent's 'request to the relevant authorities was unfair, prejudiced the respondent and amounted to unfair disciplinary action, or unfair labour practice'.¹

¹ Page 158 of the Record (p 12 of the award).

[9] The arbitrator awarded the respondent compensation equivalent to one year's salary, excluding any allowances he would have been entitled to. In sum, the respondent was awarded compensation in the amount of N\$ 1 141 630.80, which was to be paid not later than 30 November 2018.

[10] Dissatisfied with the award, the Minister lodged an appeal against the award before this court on 28 November 2018 under Case No. HC-MD-LABAPP-AAA-2018/00060. It is common cause that this appeal never saw the light of day for the reason that the applicant did not prosecute the appeal within the 90 period prescribed by rule 17(25). The appeal was, in accordance with the rules, deemed to have lapsed around February 2019.

[11] The applicant then approached this court seeking an order for the condonation of its non-compliance with the rules, which resulted in the application becoming deemed to have lapsed. The applicant also seeks an order reinstating the matter on the court's roll, with a view to having it finally disposed of in court.

The law applicable

[12] Case law is replete regarding principles that govern the court's exercise of its discretion in matters of condonation. In *Primedia Outdoor Namibia (Pty) Ltd v Tironenn Natangwe Kauluma*² Van Niekerk J referred to *Telecom Namibia Ltd v Nangolo*,³ where the applicable principles or considerations for granting condonation were listed as the following:

- (a) it is not a mere formality and may not be had merely for the asking. The applicant for condonation must satisfy the court that there is sufficient cause warranting the granting of condonation;
- (b) there must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate;

² (LCA 95-2011) [2014] NALCMD 41 (14 October 2014).

³ (SA 62/2012)[2014] NASC 23 (25 November 2014).

- (c) it must be sought as soon as the non-compliance becomes evident.
The application must be moved without delay;
- (d) the degree of delay is a relevant consideration;
- (e) the entire period of the delay that occurred and continued must be explained;
- (f) there is a point beyond which the negligence of a legal practitioner will not avail the applicant, if legally represented;
- (g) the applicant for condonation must demonstrate good prospects of success on the merits. If, however, the non-compliance is flagrant and gross, the prospects of success are not decisive;
- (h) the applicant's prospects of success are in general an important but not a decisive consideration. The cumulative effect of all the factors, including the explanation tendered for the non-compliance with the rules, should be considered;
- (i) if there are no prospects of success, there is no point in granting condonation.

[13] In *Channel Life Namibia (Pty) Ltd v Otto*,⁴ the Supreme Court dealt with the applicable principles as follows:

- (a) the importance of the case;
- (b) the prospects of success;
- (c) the respondent's interest in the finality of the case;
- (d) the convenience of the court; and
- (e) the avoidance of unnecessary delay.

[14] It is with reference to some of the foregoing consideration that the application will be considered. In this regard, the court will have regard also to the explanation tendered by the applicant and the bases of the opposition raised by the respondent.

Why the delay?

⁴ 2008 (2) NR 432 (SC) 445, para 45.

[15] The applicant, in support of the application, relied on an affidavit deposed to by her legal practitioner Ms. Kahengombe of the Office of the Government Attorney. Shorn of all the frills, her explanation for the delay, is that after noting that the appeal had not been prosecuted within the time referred to above, she filed an application for reinstatement on 14 March 2019 and a full set of papers, by both parties were filed, considering that the application for reinstatement was opposed by the 1st respondent.

[16] Thereafter, Ms. Kahengombe continues, she approached the office of the Registrar of this court to allocate the matter a hearing date via eJustice. This did not bear fruit. She then made an application for the matter to be allocated to a managing judge to deal with the application but there was no movement in that regard. It is her evidence that she then personally attended on the Registrar who advised that the matter should have been set down on the first motion. She followed that advice and set the matter down for 17 June 2019.

[17] Lo and behold, when she followed the procedures for setting the matter down on the first motion court roll, the eJustice system did not allow her the function to set the matter down, specifically by generating a document known as Annexure 9, which must peremptorily accompany the setting down of a matter on the roll. By hook, or by crook, she uploaded the said annexure by resorting to what she refers to as unorthodox means, namely, scanning the document and uploading it. The matter still could not be set down because of the procedures to be followed on eJustice.

[18] Ms. Kahengombe deposes further that seeing the time fleeting by and her repeated attempts to set that matter down were not bearing fruit, she was advised by her colleagues to launch a fresh application, which is the one presently serving before court. A letter alerting the respondent of this was written, accompanied by suggestions from the applicant's legal practitioners as to how the matter could be speeded up also with a view to saving costs. The respondent's legal practitioners dug their heels and were opposed to the applicant's suggestion.

[19] Ms. Kahengombe explained the delay with regard to some of the periods that led to the matter eventually serving before me as it eventually did. She states, in explaining some of the period of the delay that she was engaged in other urgent legal work that is specified.

[20] It is the applicant's case that she has good prospects of success for the reason that no facts are placed before court showing that an arbitrator acting reasonably, would have found that there was a probability for the 1st respondent's tour of duty to have been extended beyond the statutory retirement age. It was also urged upon the court to find that the 1st respondent had not made out a case for the service beyond retirement age as stipulated in the relevant rules. It is further stated that the arbitrator erred in finding that the 1st respondent had a clear right to the extension sought, which was the basis for the hefty compensation that was awarded by the arbitrator.

[21] It is the applicant's further case that she stands to suffer serious prejudice if the matter is not reinstated, particularly in the light of the huge amount of the award as reflected in para 9 above. The applicant states further that any prejudice by the 1st respondent can be cured by an appropriate order as to costs, which it must be stated, the applicant tendered.

[22] The applicant states further that the award has very serious consequences for the Government in the sense that it sets a precedent regarding the approach to extension of service beyond retirement age and that it would be in the interests of justice for this court to pronounce upon this matter, which is of great moment to the Government and of course her employees who may derive guidance on this issue.

[23] Lastly, the applicant alleges that from what has been mentioned above, it is plain that the application is not frivolous or *mala fide* nor designed to unreasonably postpone the respondent enjoying the fruits of the award but has been brought in a *bona fide* effort to set aside what is perceived as a

wrong award and to bring clarity on the issue of the extension of retirement in Government.

Respondent's posture

[24] Needless to say, the respondent opposes this application. In this regard, a point of law has been raised in opposition, in addition to the opposition on the merits. First, the respondent alleges that the previous proceedings under the previous case number remain extant and have not been disposed of. To this extent, it was argued that the plea of *lis alibi pendens* applies. It was accordingly submitted that the present application should be dismissed with costs on the basis of the *lis pendens* argument.

[25] On the merits, the respondent claims that the applicant should be non-suited because the delay occasioned is inordinate and that the applicant did not follow the prescripts of the rules of court, which resulted in the delay. To this end, the respondent states, the court should not come to the applicant's aid and have the applicant benefit from her non-compliance with the rules of court. In this regard, it was alleged that the applicant has not shown good cause for the court to come to her assistance.

[26] Ms. Kahengombe's handling of the matter came for trenchant criticism by the respondent in the manner. It was alleged that she did not give it the attention and urgency that it deserved. This, it was urged, showed a lackadaisical attitude to the matter and that if Ms. Kahengombe was engaged in other matters, the matter should have been referred to some one else to handle. The applicant was further accused of refusing to save time and costs by placing the amount in an interest bearing account while the matter was being litigated in court.

[27] The respondent further argued that the applicant does not enjoy good prospects of success on the merits of the matter as the compensation awarded was carefully reasoned and the arbitrator took into account the

financial position of the Government by awarding the respondent 50% of the respondent's claim.

Determination

[28] I now turn to deal with the argument adverted to above. Before I do so, however, it is important to point out one feature of the respondent's papers. It appears to me that the chasm between affidavits proper and legal argument, that should ordinarily be contained in heads of argument, has been significantly, but impermissibly narrowed, if it exists at all.

[29] It needs to be stressed that affidavits are designed to perform a specific function in applications. They constitute both the evidence and the pleadings in applications. They are primarily designed to convey the factual allegations on which an application or an opposition, as the case may be, is predicated. They are not designed to contain legal argument and contentions, as the latter must be left to heads of argument.

[30] A worrisome culture appears to be developing in this jurisdiction where affidavits are being burdened unnecessarily with legal argument. So pervasive is this practice that as witnessed in the instant case, there are actually liberal quotations of excerpts from decided cases, sometimes running into a number of paragraphs. The distinction between affidavits and heads of argument should always remain unadulterated and should be clear as night and day. Each should be confined to its proper terrain.

Lis alibi pendens

[31] I have carefully considered the respondent's application for the dismissal of the application based on the allegation that the present application is on all fours with the previous one under case no 2018-00060. My understanding of the law is that a court, properly directed, may not dismiss an application before it on the basis that there is another matter pending

either before that court or another, involving the same parties and the same cause of action.

[32] The ordinary course to adopt, is to stay the one proceeding pending the determination of the related proceeding. To succumb to the entreaties of the respondent by dismissing the other application, if it still exists, considering its withdrawal by the applicant, would be harsh and incorrect. I say so because an order of dismissal normally, if not invariably, has to be in relation to the weakness, implausibility or unsustainability of the claim or defence on the merits. I accordingly decline the invitation by the respondent in this regard.

[33] I am in any event not persuaded that the point of *lis pendens* is good or comely in the instant matter. I say so for the reason that the applicant, by letter dated 28 June 2019, indicated to the respondent that, that other application, would no longer be pursued in the light of the advice to institute the present proceedings. The proper procedure for the applicant to have pursued, which it did, was to withdraw that other application, which the applicant did by notice dated 28 January 2020.

[34] The respondent is adopting what appears to be a highly fastidious approach that does not have sufficient regard to the events that unfolded. It is clear from the papers that the position of the applicant was that the other matter be regarded as closed. It is clear that, that matter, is not being proceeded with by the applicant, as it was properly withdrawn. The only legitimate complaint that the respondent would otherwise have in the circumstances, forgetting for a moment that this is a labour case, is in relation to the costs of those proceedings and nothing more.

[35] It is clear that the applicant has, in the current application, correctly tendered costs. It stands to reason that the costs tendered would also include the costs necessarily incurred by the respondent in opposing the previous proceedings, which, as stated, never saw the light of day, as they were withdrawn. It serves no practical purpose, in the circumstances, to try and conduct a mouth-to-mouth resuscitation of the other proceedings as the

applicant made it abundantly clear that they were no longer being pursued and for good reason.

[36] I accordingly am of the considered view that the argument relating to *lis pendens* is not properly taken having regard to the peculiar circumstances of this case. The respondent is entitled to its costs in relation to that matter and there can be no debate about that. Anything more, including dismissing those other proceedings, or even staying them, would appear, on real practicalities, to be an academic exercise, serving no useful purpose in advancing what are the real and live issues between the protagonists at present.

Propriety of condoning and reinstating the appeal

[37] I have carefully considered the allegations made for and against the order sought in this matter. I have also considered the landmarks that the court is supposed to follow in considering and making an appropriate order in this matter. The cases cited by both parties, most of which are common between them, have proved very useful. I proceed with the determination below.

[38] I am of the considered view that the criticism levelled at Ms. Kahengombe by the respondent, is to some degree warranted. There can be no denying that the matter was not handled with the requisite degree of urgency and importance. If Ms. Kahengombe was engaged in other urgent and important matters, it was a poor choice to allow the current matter to be the sufferer in that regard.

[39] What cannot be gainsaid, that notwithstanding, is that Ms. Kahengombe has taken the court into her confidence and has explained in detail what happened that to a large extent, resulted in the present application. First, it would appear that the record was not delivered in time until January 2019, by the Office of the Labour Commissioner. Secondly, there was a misunderstanding on her office's part as to how the matter was

supposed to be set down on eJustice. A lot of time was lost in waiting for the set down of the matter, when it would never come.

[40] It must be mentioned in this regard, that there have been some problems with legal practitioners not properly appreciating what they have to do in some matters to have them properly and timeously prosecuted using eJustice. Some have learnt the hard way as some adverse orders have been issued as a result. I would, in the circumstances allow the delay, although not entirely excusable as practitioners of this court should know what is required even with eJustice. It is however, a reasonable explanation that cannot be thrown out flippantly, all things considered.

[41] I am of the considered view that this application was brought as soon as the applicant realised her lawyers had dropped the ball, so to speak. As indicated above, the reasons advanced in part for the delay are attributable to the failure to properly set down the previous matter, owing to having followed an incorrect procedure, appreciating as well that eJustice is a relatively new system that has taken time for all of us, including the judges, to properly understand and apply in daily court undertakings. Issues such as inclusion of third parties and intervening parties in proceedings and generation of notices of motion in urgent applications have not long ago, presented some problems until resolved eventually.

[42] I am of the considered opinion that the matter is an important one because it appears to traverse what is virgin territory, namely, the correct application of the law in matters where Government employees seek to have their periods of service extended beyond the prescribed retirement age. Clearly, this issue has financial and personnel implications for the Government and it would, in my view, benefit from proper ventilation before this court, so that the correct lines may be delineated for future guidance to both the Government and her employees.

[43] It is my view that when proper regard is had to the law applicable and the reasons advanced for the award, that the appellant has good prospects of

success on appeal. In terms of the law applicable, it would appear that the retention of an officer beyond the retirement age, should be done where it is in 'the Public Interest' to do so⁵.

[44] It is clear that in terms of the Public Service Act⁶ that the retention of a member of staff must be done by the Prime Minister, on the recommendation of the Public Service Commission. It is common cause that this did not happen *in casu* and there was no guarantee that the respondent's application would have succeeded. Pertinently, it appears doubtful that the arbitrator could, using the Labour Act, 2007, second-guess the Prime Minister's exercise of the discretion reposed in her by law, by arrogating upon himself the power to grant the application for retention beyond retirement age.

[45] Furthermore, the fact that there may have been a lapse on the part of an employee of the then Permanent Secretary, in forwarding the application to the relevant offices, does not necessarily translate to that failure creating a right in law for the employee prejudiced thereby, to be entitled to any compensation resulting from the failure or neglect by the officer concerned.

[46] Finally, I am persuaded, notwithstanding whatever imperfections may afflict the applicant's case, and the neglect to the extent that it was, that it would not be an abhorrent exercise of this court's discretion in the circumstances of this case to grant the application. In *TransNamib Holdings Ltd v Bernhardt Garoeb*⁷ the Supreme Court reasoned thus:

'Litigants have a constitutional right to a fair trial in the determination of their civil rights and obligations. In the adjudication of those rights and obligations, the Courts of law have a fundamental duty to do justice between the parties by, *inter alia*, allowing them a proper opportunity to ventilate the issues arising from their competing claims and assertions.'

⁵ Regulations on Retirement and Retention of Service Beyond Retirement Age, Art 5.1.1 (b).

⁶ Act No. 13 of 1995.

⁷ SA 26/2003 a judgment of the Supreme Court, per Maritz AJA.

[47] I am of the view, having regard to the entire conspectus of the present matter, that the interests of justice require that the applicant should be allowed that right to have its grievance heard, regardless of the extent of the delay it contributed to the matter not being timeously heard. The inconvenience and hardship that the respondent may suffer, is in my view, cushioned by the costs order that the applicant tendered.

[48] I am particularly heartened by the tender for costs, which was *mero motu* made by the applicant and with alacrity. This is so because the Labour Act in s 118, makes it clear that this court should not grant costs in labour matters and this is so for good reason. The applicant has realised that its actions or inactions, did, to a large extent, contribute to the present scenario.

[49] The tender for costs, although not provided for in this species of the law, has to be accepted as a sign the applicant's *bona fides* and penitence for placing the respondent in this position. Properly considered, it is an act of self-chastisement by the applicant that is well made in the circumstances and which the court would only be entitled to reject on good grounds.

Conclusion

[50] Having regard to all the foregoing considerations, I am of the considered view that the application for condonation and reinstatement of the appeal should be granted as prayed. The applicant has managed to pass the threshold regarding meeting the requirements for the indulgence she sought.

Order

1. The Applicant's non-compliance with the Rules of the Labour Court is hereby condoned.
2. The appeal noted under Case No: HC-MDLAB-APP-AAA-2018/00060 is hereby reinstated onto the roll.
3. The Applicant is ordered to pay the costs of the First Respondent occasioned by this application, including the costs incurred by him in

opposing the initial application under Case No: HC-MDLAB-APP-AAA-2018/00060.

4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: S. Kahengombe (with her R. Ketjijere)
Of the Government Attorney Windhoek.

RESPONDENT: H. Krüger
Of Kruger Van Vuuren & Co. Windhoek