

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: <i>Nathanael Sheyavali</i> <i>Applicant</i> <i>and</i> <i>Unitrans Namibia (Pty) Ltd</i> <i>1st Respondent</i> <i>Biatha Bianca Moonde</i> <i>2nd Respondent</i> <i>The Labour Commissioner</i> <i>3rd Respondent</i>	Case No: HC-MD-LAB- MOT-GEN- 2020/00040 Division of Court: Main Division Heard on: 26 February 2021
Heard before: Honourable Mr. Thomas Masuku, J	Delivered on: 25 March 2021
Neutral citation: <i>Sheyavali v Unitrans Namibia (Pty) Ltd</i> (HC-MD-LAB-MOT-GEN-2020/00040) [2021] NALCMD 12 (25 March 2021)	
The order: Having heard Mr. Nanhapo , on behalf of the Applicant and Mr. Marais on behalf of the Respondent and having read the pleadings and other documents filed of record: (i) The application for reinstatement is hereby refused. (ii) The application for the period within which the applicant may prosecute the appeal to be extended for a period of 90 days from the date the order is made is hereby refused. (iii) The application that the 2 nd and 3 rd respondents be ordered to release the full and complete record of arbitration proceedings under case number: CRWK 317- 17 is	

hereby refused.

(iv) There is no order as to costs.

(v) The matter is removed from the roll and regarded as finalised.

Reasons for order:

MASUKU, J:

[1] The appellant noted an appeal on 28 October 2019 pursuant to Rule 17(1)(c) of the Labour Court Rules¹ against the entire arbitration award/ruling handed down by Arbitrator Ms. Biatha Bianca Moonde the 2nd respondent dated 07 January 2019 under case number CRWK 317-17.

[2] On 01 July 2020 the matter (HC-MD-CIV-ACT-MOT-LAB-APP-AAA-2019/00064) was struck from the roll in terms of R132(10) of the Rules of court. The matter was regarded as having lapsed in terms of Rule 132(11) and regarded as finalised.

[3] The applicant now seeks the reinstatement of the matter in which he seeks the following relief:

- '1. That the appeal filed by the Applicant under Labour Court case number (HC-MD-CIV-ACT-MOT-LAB-APP-AAA-2019/00064 be and is hereby reinstated;
2. That the period within which the Applicant may prosecute the appeal is hereby extended for a further period of ninety (90) calendar days from the date that this order is made;
3. That the 2nd and 3rd Respondents be ordered to release the full and completed record of arbitration proceedings under case number: CRWK 317-17.
4. Costs of suit, only if opposed; and
5. Further and/or alternative relief.'

Background

[4] Before me stands an application for reinstatement of the appeal.

[5] The appeal filed by the applicant is only defended by the 1st respondent.

[6] In support of his application the crux of the applicants' claim is that the 2nd and 3rd

¹ Labour Court Rules GN 279 in GG 4175 of 2 December 2008

respondents failed to release the full and complete record of arbitration proceedings under case number: CRWK 317-17. The Respondent in terms of the rules is afforded a period of 21 days counting from the date of service to release the record. The 3rd Respondent being duly served with the notice of appeal and the accompanying documents failed to do so.

[7] The appeal subsequently lapsed after a reminder was issued by the registrar on 05 November 2019 notifying the applicant that the appeal will lapse in 60 days. In efforts to compel progression the applicant addressed a letter to the 3rd respondent requesting the record of arbitration proceedings however their plea fell on deaf ears.

[8] The applicants contend that as a result of the non-compliance of the 2nd and 3rd respondents the applicant failed to prosecute the appeal within the timeframe prescribed.

[9] The 1st respondent opposed this application and contends that a party dissatisfied with an arbitration award must note an appeal to such an award within 30 calendar days of the award,² and prosecute its appeal within 90 days from noting such an appeal.³ The 1st respondent contends further that in the absence of good cause demonstrated in the founding papers the court has no discretion to condone the non-compliance and reinstatement of the appeal as sought by the 1st respondent.

[10] It is common cause that the arbitration award appealed against was noted on 7 January 2019 and the applicant noted his appeal against this award on 28 October 2019, this being ten (10) months after the award was made.

[11] The condonation application filed in the appeal details the hiccups experienced by the respondent in seeking legal representation, which was only granted on 09 August 2019. One week after obtaining instructions he then approached his legal practitioner of record and secured an appointment for consultation for the following week. The appeal was noted two months after the consultation. Before court there is no explanation as to why this was the case.

[12] I therefore agree with the 1st Respondent that the delay in prosecuting the appeal cannot solely be attributed to the failure of the 2nd and 3rd respondents to file the record of proceedings.

² Labour Court Rules GN 92 in GG 4175 of 2 December 2008, Rule 17(4)

³ Labour Court Rules GN 92 in GG 4175 of 2 December 2008, Rule 17(25)

[13] What the applicant failed to do was to bring an application in terms of rule 15⁴ seeking an extension of time to enable it to file the record; an order directing the respondents to dispatch the record on a specified date; condoning the non-compliance with the rules and thereby allowing the prosecution of the appeal to be carried out within the prescribed time. It is not sufficient to merely address a letter to the respondents' requesting for the record to be dispatched.

[14] There are no allegation regarding the issue of prospects of success placed before court to enable the court to properly consider and access the propriety of granting the order of reinstatement. The applicant in his founding affidavit states that:

[23] ...the prospects of success are good as described in my condonation application.'

[15] The condonation affidavit referred to merely references section 33 of the Labour Act⁵ and concludes that the 1st Respondent contravened the said section. It fails to apprise the court of the facts that brought the applicant to that conclusion, I find that this is not sufficient, and the application should fail on that score.

[16] In the matter of *Tjiuma v Meatco Namibia*⁶ Parker, J stated that;

'Where an appeal which has been noted has lapsed *ex lege* in terms of the Labour Court Rules, rule 17(25) for want of prosecution and no application has been made to the court to condone the applicant's failure, even if the court can condone the non-compliance the result is that as a matter of law and logic, there is no appeal which the court may reinstate upon application of the applicant.'

[17] In view of the conclusions that have been recorded above, it is the court's considered opinion that the application must accordingly fail.

[18] This, being a labour matter the court does not readily grant an order for costs. There is no allegation that the applicant acted in a frivolous or vexatious manner in instituting these proceedings. There is no order as to costs in the event.

[19] In the result, I make the following order:

- (i) The application for reinstatement is hereby refused.
- (ii) The application for the period within which the applicant may prosecute the appeal to be extended for a period of 90 days from the date the order is made is hereby

⁴ Labour Court Rules GN 92 in GG 4175 of 2 December 2008, Rule 15

⁵ Labour Act 11 of 2007

⁶ *Tjiuma v Meatco Namibia* (LCA 6/2015) [2017] NALCMD 6 (16 February 2017)

refused.

- (iii) The application that the 2nd and 3rd respondents be ordered to release the full and complete record of arbitration proceedings under case number: CRWK 317- 17 is hereby refused.
- (iv) There is no order as to costs.
- (v) The matter is removed from the roll and regarded as finalised.

Judge's signature:	Note to the parties:
Masuku,J	Not applicable
Counsel:	
Applicant:	Defendant:
Mr. Nanhapo Of Brockerhoff and Associates Legal Practitioners	Mr. Marais Of Engling, Stritter & Partners