REPUBLIC OF NAMIBIA SPECIAL INTEREST

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-APP-AAA-2020/00009

In the matter between:

BUSINESS FINANCIAL SOLUTION **APPLICANT**

and

JULIUS ANDIMA **1st RESPONDENT**
THE LABOUR COMMISSIONER **2nd RESPONDENT**
NONDUMISO MBINDI (ARBOTRATOR) **3rd RESPONDENT**

Neutral citation: *Business Financial Solution v Andima and Another (*HC-MD-LAB-APP-AAA-2020/00009) [2021] NALCMD 28 (16 June 2021)

Coram: PARKER AJ
Heard: **3 June 2021**
Delivered: **16 June 2021**

Flynote: Labour law – Appeal – Prosecution of – Rule 17 (25) of the Rules of the Labour Court – Rule 17 (25) providing 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 – Words should be given their ordinary grammatical meaning – Such ordinary grammatical meaning to be given to words in

context – Exception being where such interpretation leading to hardship or manifest absurdity – Text to be interpreted in its context includes its intra-textual context – Court must try if reasonably possible, to adopt an interpretation that will render the legislation (or subordinate legislation) effective – Court finding the provisions of r 17 (25) peremptory and failure to comply therewith fatal – Court having no inherent jurisdiction which would entitle it to act contrary to an express provision of a statute – Failure to comply with r 17 (25) renders the noted appeal void and the right to appeal is terminated thereby.

Summary: Labour law – Appeal – Prosecution of – Rule 17 (25) of the Rules of the Labour Court – Rule 17 (25) providing that an appeal to which this rule applies must be prosecuted within 90 days after the noting of the appeal, and unless so prosecuted it is deemed to have lapsed – Court finding that words in statutory provision should be given their ordinary grammatical meaning context – Court finding that an appeal noted but not prosecuted within the appropriate time prescribed by rule 17 (25) renders the appeal void and appellant's right to appeal is terminated thereby – Court having no power to overlook the clear unambiguous words of r 17 (25) and extend the time limit – Court having no inherent power entitling it to act contrary to the express words of a statute – Consequently appeal struck from the roll.

ORDER

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1. The case is struck from the roll. Reason: Labour Court having no power to extend the 90 days' time limit to prosecute an appeal, when the appeal is deemed to have lapsed.
2. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This matter was enrolled on the first motion court roll. On 17 March 2021 the court made the following order:

'The case is struck from the roll. Reason: Labour Court having no power to extend the 90 days' time limit to prosecute an appeal, when the appeal is deemed to have lapsed.'

[2] Ms Nambinga, counsel for the appellant/applicant, has asked the court to give reasons for its order. These are the reasons.

[3] Rule 17 provides:

'(25) 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.'

[4] In the interpretation and application of subrule (25) of r 17, that subrule should be read with subrules (17) (18) and (19).

[5] In virtue of subrule (19) of r 17, compliance with subrule (25) of r 17 does not involve any complicated and complex and time-consuming procedure; and it does not require a great deal of effort. All that the appellant is required to do is to apply to the registrar on Form 5 to assign a date for the hearing of the appeal; and if the appellant so failed to do so, the respondent was entitled to apply to the registrar in like manner to set a date down for the hearing of the appeal.

[6] The mere receipt by the registrar of either the appellant's application or the respondent's application constitutes prosecution of the appeal, that is, the appeal 'is deemed to have been duly prosecuted'. It cannot really be said that the procedure could occasion hardship to an appellant who has noted an appeal (see *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Other* 2009 (2) NR 793 (HC)), considering the long period of allowable time limit and the simplest of procedure involved. I say all this to make the point that the implementation of r 17 (25) is completely and totally in the hands of the appellant. It is not like the situation respecting the provisions of s 86 (18) of the Labour Act 11 of

2007 where a party cannot do anything to ensure that the arbitrator complied with the 30 days' time limit for the issuance of an arbitration award by the arbitrator (see *Torbitt v International University of Management* 2017 (2) NR 323 (SC)).

[7] Besides, and *a fortiori*, the application of r 17 (25) is not subject to any other rule of the rules of the Labour Court; neither is it subject to any subrule of r 17 (see *Namibia Press Agency v Katamila* (LCA 68/2015) [2017] NALCMD 8 (9 March 2017)); and so, an appellant whose appeal has lapsed in terms of r 17 (25) cannot be thankful of r 15, which provides:

> '**Non-compliance with rules**
> The court may, on application and on good cause shown, at any time-
> (a) condone any non-compliance with these Rules;
> (b) extend or abridge any period prescribed by these Rules, whether before or after the expiry of such period.

[8] Paragraphs (a) and (b) of r 15 should be read globally and intertextually in order to get the meaning of r 15. Rule 15 concerns the extension or abridgement of prescribed periods whether before or after the *expiry* of such period. (Italicized for emphasis). The expiration of a period is polar apart from the lapsing of an appeal that has been noted. As I have said, nobody or no judge can abridge or extend the period of a process that is void or where the right in it has terminated. (See para 9 below.) This is so as a matter of common sense and logic.

[9] In law, lapse means 'the termination of a right or privilege through disuse or failure to follow appropriate procedures'. (*Concise Oxford English Dictionary* 12 ed) 'Lapsed' means something has become 'void' (Bryan A Garner *A Dictionary of Modern Legal Usage* 2nd ed (1995)). And '[P]roceedings lapse … where no step is taken in an action within the appropriate time'. (Roger Bird *Osborn's Concise Law Dictionary* 7th ed (1983))

[10] What is more, r 17 (25) is responsive to the principle that labour disputes must be resolved and disposed of expeditiously. (*National Housing Enterprise v Hinda-Mbazira* 2014 (4) NR 1046 (SC)). Take these illustrations for example.

[11] The employee **X** is dismissed after an internal hearing. **X** is aggrieved thereby. In the course of events, the dispute is adjudicated upon by an arbitrator in terms of the Labour Act. An award is granted in favour of the employer. The employee was aggrieved; and so, he noted an appeal.

[12] The employer thought it wise not to fill **X's** post when the employer received the notice of appeal. The employer reckoned that in terms of r 17 (25), **X** has 90 days to prosecute the appeal; and the employer was prepared to wait because if he filled the post with a new employee **Z** and the appeal judgment went in favour of the dismissed employee **X**, the employer faced a very serious predicament. He would not have a good and valid reason to dismiss the new employee **Z**, within the meaning of s 33 (1) of the Labour Act.

[13] The tables could turn, if the employer **Y** were to be the party that had noted the appeal. It is in the interest of the employee **X** to know his fate as soon possible. The employee cannot afford an agonising wait – not knowing whether the employer was going to prosecute the appeal he has noted; not knowing whether to leave all behind him and move on and look for a new job; not knowing whether to wait and see what would come out of the appeal. In that event, the employee **X** was precariously on the horns of dilemma. He reckoned that for 90 days, he was prepared to wait.

[14] The purpose of r 17 (25) is to attempt to relieve the employer or employee of such clearly agonising situation. Therefore, I see that the time limit in r 17 (25) is in the interest of both employers and employees; and it answers to the *Hinda-Mbazira* principle that labour disputes ought to be disposed of expeditiously. Consequently, failure to comply with the time limit in r 17 (25) is fatal. The failure to comply with r 17 (25) terminates the appellant's right to appeal (*Concise Oxford English Dictionary*). The appeal becomes void (Bryan A Garner *A Dictionary of Modern Legal Usage*). The appeal lapses because appellant failed to take steps within the appropriate time. (Rodger Bird *Osborn's Concise Law Dictionary*)

[15] The word ‘must’ in r 17 (25) ought, therefore, to be interpreted to provide that the prescription is peremptory, considering the purpose of the provision and the intention of the rule maker, which is to ensure that labour disputes are disposed fo expeditiously. (See *Compania Romana de Pescuit (SA) v Rosteve Fishing (Pty) Ltd and Tsasos Shipping Namibia (Pty) Ltd (Intervening): In re Rosteve Fishing (Pty) Ltd v MFV Captain B1, Her Owners and All Others Interested in Her* 2002 NR 297 (HC).)

[16] It must be remembered, an important principle of interpretation is this. The court has to determine the purpose of the legislation (including subordinate legislation) and give effect to it. The legislature or the maker of subordinate legislation is presumed not to intend legislation or subordinate legislation to be futile or nugatory (Christo Botha *Statutory Interpretation: an Introduction for Students* 5th ed (1st Impr) (2014) at 133.)

[17] Furthermore, it has been said that the interpretation of statutory provision involves more than analysing the particular provision in question. To interpret a text in its context includes its intra-textual context, that is, the enactment or the rule or regulation as a whole (Christo Botha *Statutory* Interpretation at 126). The Christo Botha proposition of the law is in accord with what Professor G E Devenish in his work *Interpretation of Statutes* (1992) at 32 refers to as the holistic approach. And on that approach the learned Professor writes:

‘Today in the United Kingdom and in Commonwealth countries there is a tendency by the courts to adopt a more holistic approach, namely, that there is only one rule or principle and therefore, according to Dreidger, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.’

[18] In the Labour Act, when it comes to the noting of an appeal, the Act in s 89 (3) grants the court the discretionary power ‘to condone the late noting of an appeal on good cause shown’. Section 89 does not say the appeal is deemed to have lapsed if it was not noted within the time limit. This is indicative of the fact that the Legislature did not intend that an appeal that is noted outside the prescribed limit is

deemed to have lapsed. And the Labour Act does not provide that the court's power to condone the late noting of an appeal is applicable also to the prosecution of an appeal.

[19] Thus, reading s 89 (3) of the Labour Act intertextually with r 17 (25), as I should, I come to the inevitable conclusion that it was not the intention of the rule maker that the late prosecution of an appeal may also be condoned by the court. In that regard, it should be remembered, the court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of a statute. (*S v Safatsa and Others* 1989 (1) SA 821 (A) per Rabie CJ at 838J-839A-C)

[20] Furthermore, it has been said, if there are two or more possible interpretations, the court must try, if it is reasonably possible, to adopt an interpretation that will render the legislation effective. In *Esselman v Administrator, SWA* 1974 (2) SA 597 (SWA), the court emphasized an 'effective and purposive' interpretation over one which would defeat the provision, leaving it useless. And we should not overlook the fundamental principle in the construing of statutes that it is presumed that words are not used in a statute without a meaning and are not taulogous or superfluous, and effect must be given, if possible, to all the words used, for the Legislature or a subordinate legislation maker is deemed not to waste words or to say anything in vain. (*Molu Butchery Ltd v The People* (1978) ZR 339 (SC) at 341)

[21] In sum, I repeat what I said about interpretation of statutory provisions in *Rally for Democracy and Progress v Electoral Commission* 2002 (2) NR 793:

'[7]…The rule is firmly established in the practice of this court that in interpreting statutes recourse should first be had to the golden rule of construction because the plain meaning of the language in a statute is the sagest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it will be permissible for a court of law to depart from such a literal

construction, for example where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent: see *Jacob Alexander v The Minister of Justice and Others* case No A210/2007 (Judgment on 2 July 2008) (unreported) at 18-19 where the relevant authorities are approved and relied on. In *Tinkham v Perry* [1951] 1 All ER 249 at 250E, which Hannah J cited with approval in *Engels v Allied Chemical Manufactures (Pty) Ltd and Another* 1992 NR 372 (HC) at 380F-G, Evershed MR stated succinctly,

Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.'

[22] Accordingly, I have given the words 'the appeal is deemed to have lapsed' their ordinary, literal or grammatical meaning in context, and I have ascertained that those words are clear and unambiguous. That being the case, I hold it right to give those words their ordinary grammatical meaning, as I have done previously, because the literal construction does not fall within any of the exceptional cases, in which event, I would have been permitted to depart from such literal construction, for example, where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. (see *Rally for Democracy and Progress v Electoral Commission of Namibia* para 7)

[23] I say it again; none of the exceptional cases referred to in *Rally for Democracy and Progress* exists. It follows that an appeal which has been noted but which has not been prosecuted in compliance with r 17 (25) is void; it has terminated; and it cannot, as I have demonstrated, be revived, and the prescribed 90 days' time limit extended. In sum; failure to act in compliance with the peremptory precept of r 17 (25) is fatal, without a doubt. The court has no power to overlook those clear and unambiguous words and extend the time limit, which the court, as I have said more than once, clearly has no power to do, without offending the principle in *S v Safatsa and Others*. Any contrary interpretation of r 17 (25) is *per incuriam* and wrong.

[24] In sum, I note that no discretion is given to the court to revive an appeal that is deemed to have lapsed, and extend the 90 days' time limit. It is not the case where the rule provides that except with the leave of the court (or such provision), the court

shall not hear an appeal that has been noted but not prosecuted within the 90 days' time limit (or suchlike provision). The respondent, having obtained the aforementioned award, is entitled to assume that the judgment is final and conclusive, and to regulate his or her conduct accordingly, after the appeal, which was noted, is deemed to have lapsed by operation of law, that is, r 17 (25) of the rules of Labour Court. It would not lie in the mouth of the respondent to make such assumption, if what has expired is the time for noting the appeal in virtue of s 89 (3) of the Labour Act (see *Cairns' Executors v Gaarn* 1912 AD 180.) Consequently, as I have said more than once, for using the words, as the rule maker did, in r 17 (25), it was clearly the intention of the rule maker is that an appeal that has been noted and not prosecuted within the 90 days' time line renders the appeal void (Bryan A Garner *A Dictionary of Modern Legal Usage*); and results in the termination of appellant's right to appeal. (*Concise Oxford English Dictionary*)

[25] Based on these reasons, the order set out in para 1 was granted. The matter is finalized and removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

APPLICANT:	S NAMBINGA Of Palyeenime Inc, Windhoek
1st & 2ND RESPONDENT:	R SHIPINDO Of Metcalfe Beukes Attorneys, Windhoek
3rd RESPONDENT:	N MBINDI In Person