



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-APP-AAA-2021/00065

In the matter between:

FRANSISCO ABREU

APPLICANT

and

NAMIBIA POWER CORPORATION (PTY) LTD

FIRST RESPONDENT

MEMORY SINFWA N.O

SECOND RESPONDENT

THE LABOUR COMMISSIONER

THIRD RESPONDENT

Neutral citation: *Abreu v Namibia Power Corporation (Pty) Ltd* (HC-MD-LAB-APP-AAA-2021/00065) [2021] NAHCMD 54 (14 December 2021)

Coram: PARKER AJ

Heard: 26 November 2021

Delivered: 14 December 2021

Flynote: Labour Court – Appeal – Condonation – Late filing of notice of appeal – Noting of appeal beyond thirty-day period – Applicant, lay litigant, acting in person filing notice of appeal within the thirty days’ period but notice defective as was lodged on the wrong Form – Court finding applicant’s legal practitioners’ filing of the correct

Form only amending applicant's notice of appeal – Court finding explanation for delay sufficient and satisfactory – Court finding further that applicant having prospects of success – Application for condonation accordingly granted.

Held, application for condonation must be brought as soon as the delay has become apparent and if not so brought, sufficient and satisfactory explanation for the delay required.

Held, further, the balancing exercise between (a) explanation for delay in ringing application to condone and (b) prospects of success on appeal is a question of deciding what weight to attach to each factor.

Summary: Labour Court – Appeal – Condonation – Late filing of notice of appeal – applicant lay litigant acting in person filed notice of appeal on wrong Form but within the time limit of 30 days – Subsequently, applicant secured services of legal practitioners who recognizing the defect and filed the notice of appeal on correct Form – Court finding that legal practitioner's act merely correcting defect in filed notice of appeal – Court finding that applicant has prospects of success on appeal since arbitrator's decision is perverse and it violated the rule of law as arbitrator misconstrued s 33(1)(a) and (b) of the Labour Act 11 of 2007.

ORDER

1. Appellant's late noting of the appeal is condoned and the appeal is reinstated on the roll.
2. The provisions of rule 17(25) of the Labour Court rules shall apply from the date of this judgment.
3. There is no order as to costs.
4. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This is primarily an application to condone the late noting of an appeal, contemplated in s 89(3) of the Labour Act 11 of 2007, from the arbitration award made on 29 July 2021 in case no. CRWK 825-18. Mr Mwandingi represents applicant; and Ms Miller first respondent.

[2] The law is settled that the application for condonation must be brought as soon as the delay had become apparent; and if was not so brought, there must be a sufficient and satisfactory explanation for the delay in the bringing of the application for condonation. (See *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC) para 12.)

[3] In considering such application, the court ought to consider two factors, namely, (a) sufficient and satisfactory explanation for the delay in bringing the condonation application; and (b) prospects of success on appeal. And it was held by the Supreme Court in *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC) para 16 that-

‘...the prospects of success on appeal, though an important consideration, standing alone is not a decisive consideration. There are also a number of cases that show that despite the prospects of success being good, an application for condonation may or should not be granted if there was a flagrant violation or non-observance of the rules.’

[4] The point should also be underlined that the determination of such condonation application involves a balancing exercise, that is the balancing of the two factors mentioned in items (a) and (b) in para 3 above. As to the ‘balancing exercise’, Mtambanengwe AJA made the following pithy and insightful observation in *Nangolo and Others* at para 21:

'With respect, the balancing exercise the court is required to do in such cases does not require or involve an equation of the factors under consideration (see para 3 above), but is a question of deciding what weight to attach to each factor.'

[5] In the instant matter, I do not find the need to garnish this judgment with the chronology of attempts made by the appellant to approach the seat of judgment of the court. Suffice to mention some of the attempts.

[6] It is undisputed that appellant has always had the intention to appeal against the arbitration award made on 29 July 2021, and he pursued such intention by filing what he, acting in person, considered to be a notice of appeal on 18 August 2021. The day of 18 August 2021 is definitely crucial.

[7] That notice of appeal was defective inasmuch as it was lodged on Form LC38 (with the title 'APPEAL APPLICATION'). *Pace* Ms Miller, the completed Form LC38 was served on 18 August 2021 on third respondent (the 'Labour Commissioner') and first respondent. Both respondents acknowledged receipt of the process. In my view, by all intents and purposes, appellant noted the appeal, albeit on a wrong Form, within 30 days of the date of the award.

[8] Appellant secured the services of legal practitioners on 3 September 2021. Having noticed that appellant had noted the appeal on a wrong Form, appellant's legal representatives informed the first respondent's legal representatives about the predicament appellant was in and that a condonation application would be filed on or before Friday, 10 September 2021. First respondent's legal representatives drew the attention of applicant's legal representatives to the fact that the so-called defective notice of appeal was not served on first respondent. I have demonstrated previously that first respondent's legal representatives' assertion is factually incorrect.

[9] I have found that appellant, a lay litigant acting in person, filed and served Form LC38 on 18 August 2021; and appellant secured the services of legal practitioners on 3 September 2021. When applicant's legal representatives found

that the earlier notice was defective, they acted promptly and lodged a fresh notice of appeal on 10 September 2021 and filed a condonation application the same day.

[10] I accept that the appellant's notice of appeal, though defective, was filed within the 30 days statutory time limit. The fresh notice of appeal should be seen as correcting the defect. In any case, the condonation application was brought on 10 September 2021, that is, only nine days from 28 August 2021, the last day on which the notice of appeal should have been filed in terms of s 89(2) of the Labour Act. It follows that even if the defective notice of appeal was discounted, I think the condonation application was 'brought as soon as the delay became apparent'. (*Telecom Namibia Ltd v Nangolo* para 12)

[11] I proceed to carry out a balancing exercise between item (a) and item (b), discussed in para 3 above (See *Nangolo* para 21.) Item (a) has been considered under paras 6 to 10 above. Item (b) concerns prospects of success, and I discuss it now. The arbitrator's award is 'perverse' in the sense used by the Supreme Court in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC). The arbitrator is wrong in concluding that since the employer had a valid and fair reason to dismiss but failed to follow a fair procedure, the dismissal was not unfair. *Rossam v Krantz Welding Engineering (Pty) Ltd* 1998 NR 90 (LC) tells us that, as provided in s 33(1) of the Labour Act, a fair dismissal is a dismissal that is substantially fair (para (a) of s 33(1)) and procedurally fair (para (b) of s 33(1)). This is indubitably a question of law. (*Shilongo v Vector Logistics* [2014] NALCMD 33)

[12] To allow such perverse decision of the arbitrator to stand unappealed against will definitely wreak injustice to appellant, apart from such decision being offensive of the rule of law which is a foundational principle of the Namibian Constitution, entrenched in art 1. (*Kazekondjo v Minister of Safety and Security* NASC (25 October 2021) para 23) Thus, in the instant matter and for this reason, I attach great, unmeasurable weight to the factor of prospects of success. (*Nangolo and Others* para 21) No arbitrator acting on the evidence and applying the law correctly will come to such perverse decision as the arbitrator in the instant matter did.

[13] It is, therefore, in the interest of due administration justice and the rule of law to condone the appellant's late noting of the appeal in terms s 89(3) of the Labour Act. It follows as a matter of law, that the provisions of rule 17(25) of the Labour Court rules shall apply from the date of this judgment.

[14] In the result I make the following order:

1. Appellant's late noting of the appeal is condoned and the appeal is reinstated on the roll.
2. The provisions of rule 17(25) of the Labour Court rules shall apply from the date of this judgment.
3. There is no order as to costs.
4. The matter is finalized and is removed from the roll.

C Parker
Acting Judge

APPEARANCES:

APPLICANT:

M Mwandingi
Of Mwandingi Attorneys, Windhoek

FIRST RESPONDENT:

S Miller
Of Shikongo Law Chambers, Windhoek