

REPUBLIC OF NAMIBIA



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

<b>Case Title:</b> VICTOR AKWENYE vs LETSHEGO BANK NAMIBIA LIMITED	<b>Case No:</b> HC-MD-LAB-MOT-GEN-2022/00147
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> PARKER AJ	<b>Date of hearing:</b> 26 OCTOBER 2022
	<b>Delivered on:</b> 8 NOVEMBER 2022
<b>Neutral citation:</b> <i>Akwenye v Letshego Bank Namibia Limited</i> (HC-MD-LAB-MOT-GEN-2022/00147) [2022] NALCMD 69 (8 NOVEMBER 2022)	
<b>IT IS ORDERED THAT:</b>  1. The application for condonation is dismissed.  2. There is no order as to costs.  3. The matter is finalised and removed from the roll.	
<b>Reasons for the Order:</b>  [1] The applicant noted an appeal on 10 March 2022 against an award made by the second respondent, the arbitrator. The applicant failed to prosecute the appeal within the time limit prescribed by rule 17 (25) of the Labour Court Rules ('the rules of court'). In the instant proceeding, the applicant seeks condonation for his non-compliance with the said rule 17 (25) of the rules of court. The applicant seeks further a consequential order to reinstate the appeal on the roll.	

[2] Ms Chinsembu represents the applicant and Mr Dicks represents the first respondent. The first respondent opposes the condonation application on the ground that there is no appeal properly before the court whose date of prosecution the court is asked to extend.

[3] Thus, Mr Dicks submitted that it is clear from the applicant's founding papers that the award was issued on 7 February 2022 and was the same day sent under the cover of an email to a Vries at Nafinu, the apparent trade union representative of the applicant. The applicant does not aver in his founding papers that Vries was not his trade union representative; neither does he aver that he did not receive the award on 7 February 2022.

[4] Realizing that the 30-day time limit had been breached when he noted his appeal on 10 March 2022, the applicant attempted to escape the time limit trap by averring in his replying affidavit that the award was served on him on 9 February 2022 which is at variance with what is stated in the founding papers.

[5] I cannot accept the applicant's new evidence in the replying affidavit without offending the long line of authorities that an applicant must stand and fall by his founding affidavit, and should therefore make the necessary allegations in his founding affidavit to support his case.<sup>1</sup> It is trite that all allegations necessary to sustain the relief sought in an application proceeding must generally be supported by the evidence in the founding paper.<sup>2</sup>

[6] Section 89 (3) of the Labour Act 11 of 2007 empowers the court to 'condone the late noting of an appeal on good cause shown'. But the applicant decided, upon legal advice, I suppose, not to take advantage of the statutory largesse offered by s 89 (3) of the Act. The explanation peddled by Ms Chinsembu in her submission is that there had not been a late noting of the appeal, and so 'there was no need for the applicant to seek condonation for the noting of the appeal as the appeal was noted timeously'.

[7] I have demonstrated previously that counsel is wrong. The result is that the

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<sup>1</sup> *Eg Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (SWA) Ltd and Another intervening* 1994 NR 10 at 15J-16E.

<sup>2</sup> *Kuiiri and Another v Kandjoze and Others* 2009 (2) NR 447 (SC) para 16.

applicant is out of court. The upshot is this. There is no appeal properly before the court, as Mr Dicks submitted, whose prosecution has elapsed, within the meaning of rule 17 (25) of the rules of court, requiring the court to extend the time limit and consequentially reinstate the appeal. As a matter of logic, the condonation application to condone the non-compliance with rule 17 (25) is, therefore, otiose. And, as a matter of law and logic, if there was no appeal properly noted, the prosecution of it does not arise.

[8] Based on these reasons, the application fails. In the result, it is ordered that:

1. The application for condonation is dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

<b>Judge's signature</b>	<b>Note to the parties:</b>
Parker Acting Judge	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>First Respondent</b>
W Chinsembu of Henry Shimutwikeni & Co Inc, Windhoek	G Dicks of Köpplinger Boltman, Windhoek