

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-LAB-APP-AAA-2021/00006

In the matter between:

MARTIN MARIUS RHEEDER

APPELLANT

and

CIC HOLDING (PTY) LTD

RESPONDENT

Neutral Citation: *Rheeder v CIC Holding (Pty) Ltd* (HC-MD-LAB-APP-AAA-2021/00006) [2023] NALCMD 1 (16 January 2023)

Coram: MASUKU J

Heard: 7 December 2022

Delivered: 16 January 2023

Flynote: Labour Law – Labour Appeal – Late noting of a labour appeal – Whether or not an appeal may be prosecuted without seeking condonation for the late filing of

the appeal – Section 89(2) of the Labour Act 11 of 2007 – Rule 17(4) of the Labour Court Rules.

Summary: The applicant, on 29 January 2021, purportedly noted an appeal against an award issued by the Office of the Labour Commissioner on 24 December 2020. After a long while of inactivity, the purported appeal noted lapsed as it was not prosecuted within the time limits prescribed by rule 17(25). The applicant in turn filed a condonation application for his failure to prosecute his appeal timeously as well as be granted an extension of time to prosecute such appeal.

The respondent, however, opposed the application and stated, among other things, that there in fact exists no appeal before the court, because the appeal was initially noted out of time.

Held: that the applicant noted his appeal outside the 30-day period permitted for the noting of an appeal in terms of s 89 of the Labour Act, Act 11 of 2007.

Held that: without a successful application for condonation for the late noting of the appeal, the current application is premature and falls by the way side on this basis alone. A court cannot reinstate a 'lapsed' appeal, where there, effectively, is no appeal because it was not properly noted.

The application was struck from the roll with no order as to costs.

ORDER

1. The application is struck from the roll.
 2. There is no order as to costs.
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RULING

MASUKU J:

Introduction

[1] This is an application for condonation for failure to prosecute an appeal within the 90 days as prescribed by rule 17(25) of the Labour Court Rules and for extension of the same period to enable the applicant to set down the appeal for hearing.

[2] The respondent opposes the applicant's application. The respondent strongly contends that even if all of the aforementioned indulgences and relief the applicant seeks in his notice of motion are granted by this court, same will be unavailing. The basis of such opposition will be discussed as the judgment unfolds.

The parties and their representation

[3] The appellant, in this matter, is Mr. Martinus Marius Rheeder, an adult Namibian male of Otjiwarongo, Republic of Namibia.

[4] The respondent is CIC Holding (Pty) Ltd, a company duly incorporated with limited liability in terms of the company laws of this Republic. Its place of business is situate at Northern Industry, Windhoek, Republic of Namibia.

[5] The appellant in this matter, is represented by Mr. Bangamwabo, whereas the respondent is represented by Mr. Dicks.

[6] For purposes of this ruling, I will refer to the parties as follows: Mr. Rheeder will be referred to as 'the applicant', while CIC Holding (Pty) Ltd will be referred to as 'the respondent'.

Background

[7] I am confident that this judgment will be better appreciated when the background is revealed to the reader, which I dutifully proceed to do.

[8] The applicant noted an appeal against an arbitration award issued by the Labour Commissioner on 29 January 2021. The award is dated 24 December 2020 and was conveyed to the applicant by email on even date. According to the applicant, however, he only became aware of the award on 28 December 2020.

[9] The applicant, through his erstwhile legal practitioners, filed a notice of appeal (Form 11 and LC41) on 29 January 2021. The applicant could not prosecute the appeal within the prescribed period of 90 days for reasons which *inter alia* include the applicant being unable to pay legal fees for private instructions and the unfortunate passing of the wife of the Mr Gilroy Kasper, the applicant's then legal practitioner. As a result of the bereavement, Mr Kasper was out of the office for some considerable time.

[10] The applicant's erstwhile legal practitioners subsequently withdrew from representing the applicant on 13 October 2021 and upon applying for Legal Aid, the applicant procured the services of the legal practitioners currently on record.

[11] It is essential to note that the applicant's appeal lapsed on 30 April 2021. Not only that, the case had been inactive for a long period of time prompting the issuance of notices of inactivity in terms of rule 132, calling upon the applicant to show cause why the case had been inactive for more than six months.

[12] Despite vigorous opposition from the respondent, this court accepted the explanation proffered by the applicant for the inactivity and postponed the matter for a status hearing.

[13] The parties herein then filed a joint status report in terms of which they proposed the dates for the applicant to apply for condonation and reinstatement of the appeal. The applicant then instituted the instant application for condoning the failure to prosecute the appeal within the timeframes prescribed by the Rules of Court and reinstatement of the lapsed appeal.

[14] The respondent filed an answering affidavit opposing the applicant's application for condonation and reinstatement of the lapsed appeal. The grounds for the respondent's opposition are primarily premised on the fact that the appeal was

filed late and the applicant should have applied for condonation for late noting of the appeal and that in any event, that there is no adequate explanation proffered by the applicant for the delay in prosecuting the appeal.

Legal issues

[15] The legal issues that are implicated in this judgment are two-fold. The first issue that this court is tasked to determine is whether or not the appeal was timeously noted. If it is found to be timeously noted, the second issue comes to life and that is whether or not the applicant has proffered a reasonable explanation for the failure to timeously prosecute the appeal warranting this court to invoke its discretion and indulgence to condone and reinstate the applicant's lapsed appeal.

[16] I shall proceed to outline the legal principles applicable herein.

Legal principles

[17] Section 89(2) of the Labour Act of 2007 (hereinafter referred to as 'the Act') provides that:

'A party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on the party.' (Emphasis added)

[18] Section 89(2), quoted above, makes it clear that appeals against arbitrators' awards must be noted within 30 days after the award is served on the party seeking to lodge an appeal against the said award.

[19] Section 89(2) must be read together with rule 17(4) of the Labour Court Rules, ('the rules'), which further stipulates that:

'The notice of appeal referred to in subrule (2) or (3) must be delivered within 30 days after the award, decision or compliance order appealed against came to the notice of the appellant.'

[20] As evident from rule 17(4), the notice of appeal must be delivered within 30 days after the award or decision became known to the appellant.

The applicant's case

[21] The bone and marrow of the applicant's case is that the arbitration award was served on the applicant via email on 24 December 2020 and the applicant only opened his email and received same on 28 December 2020. The effective date of service was thus 28 December 2020. Thirty (30) calendar days from 28 December 2020 lapse on 28 January 2021.

[22] In this connection, Mr Bangamwabo argued that the notice of appeal is dated 27 January 2021 and was indeed served on the respondent on 28 January 2021 before the 30 days' period lapsed as evinced by an affidavit of service of a certain Riaan Gaoseb filed on record but was only filed on the e-justice system on 29 January 2021.

[23] In light of the above, Mr Bangamwabo, submitted that the respondent was served with the appeal papers before the expiration date.

[24] In respect of the condonation sought, Mr Bangamwabo argued that it is clear from the applicant's papers that the applicant's failure to timeously prosecute the appeal is attributed to the absence of his erstwhile legal practitioners for a considerable period of time due to the death of his wife. A further reason proffered for the applicant's failure to prosecute the appeal within the prescribed time is a financial burden on the part of the applicant. This subsequently led to the applicant's erstwhile legal practitioners' withdrawal, resulting in the applicant applying for legal aid.

[25] Mr Bangamwabo concluded by submitting that in addition, it is common cause that upon appointment of the new legal representatives on instructions from Legal Aid, the applicant and his legal practitioners of record could not instantly file the application for condonation and reinstatement of the lapsed appeal because they

had to first explain the inactivity pursuant to a notice issued by this court in terms of rule 132 of the High Court Rules.

[26] The explanation for inactivity was opposed leading to protracted exchange of papers and arguments on the subject. It is manifestly clear that it would have been premature for the applicant and/or his legal representative of record to institute an application for condonation and reinstatement of the lapsed appeal before disposing of the opposed Rule 132 proceedings, so Mr Bangamwabo argued.

The respondent's case

[27] The respondent came out guns blazing by contending that it repeatedly pointed out to the applicant that his appeal was filed out of time.

[28] Mr Dicks argued that in the unlikely event that this court finds that the appeal was filed timeously and in accordance with s 89(2) of the Act, the application for condonation should, in any event, be refused.

[29] On this score, Mr Dicks argued that the principles governing condonation applications have been distilled from a multitude of cases before this court. Damaseb, JP, has succinctly summarised them.¹ These include that there must be an acceptable explanation for the delay; that condonation must be sought as soon as the non-compliance has come to the fore and that there is no point in granting condonation if there are no prospects of success.

[30] Particularly in deciding applications of this nature, the court performs a balancing exercise between the explanation for the delay in bringing the application and the prospects of success on appeal.²

[31] It was further argued for the respondent that the delay in prosecuting the appeal from 29 January 2021 to 13 October 2021, when applicant's erstwhile legal practitioners withdrew, is not satisfactorily explained, apart from raising financial constraints and the unfortunate passing away of the wife of Mr Gilroy Kasper.

¹ *Telecom Namibia Ltd v Nangolo and Others* NAHCMD (LC 33/2009) 28 May 2012.

² *Abreu v Namibia Power Corporation (Pty) Ltd* (HC-MD-LAB-APP-AAA-2021/00065) [2021] NALCMD 54 (14 December 2021).

[32] In conclusion Mr Dicks argued that the applicant does not enjoy any prospects of success on appeal.

Discussion

[33] It is clear as day that the arbitrator's award was delivered on 24 December 2020. On the applicant's own version, under oath, his appeal was only noted on 29 January 2021, outside the 30-day period permitted for the noting of an appeal in terms of the Act.

[34] I am therefor of the view that the relief that the applicant currently seeks is unavailing, given that the appeal was not properly noted at the outset.

[35] Without a successful application for condonation for the late noting of the appeal, the current application is premature and falls to be dismissed on this basis alone. A court cannot reinstate a 'lapsed' appeal, where there, effectively, is no appeal because it was not properly noted.

[36] In the matter of *Pathcare Namibia (Pty) Limited v Du Plessis*,³ Parker AJ states as follows:

[4] Appeals under the Labour Act 11 of 2007 ('the Act') are governed by s 89 of the Act; and s 89(3) gives the court the discretionary power to condone 'the *late noting* of an appeal on good cause shown'. (Italicised for emphasis.) The discretion is not an absolute discretion; it is a guided discretion, that is, in the exercise of the discretion the court may grant a condonation application only if, in the opinion of the judge, the applicant has shown good cause for the applicant's failure to note the appeal within the time limit prescribed by s 89(2) of the Act. What this means is that the court may exercise its discretion in favour of granting an application to condone only if the appellant has shown 'good cause'. Furthermore, and significantly; what the court has discretionary power to condone is the 'late' noting of an appeal; not anything else.'

[37] According to Parker AJ, the court has the discretionary power to condone the late noting of an appeal on good cause shown. However, the applicant in this matter has not even brought an application to seek condonation for the late noting of the

³ *Pathcare Namibia (Pty) Limited v Du Plessis* (LCA 87/2011) [2013] NALCMD 28 (29 July 2013) at para 4.

appeal. Instead the applicant sought condonation for failure to prosecute the appeal in the prescribed time and an extension of the period within which to prosecute the appeal.

[38] Whether the applicant became aware of the appeal on 24 December 2020 or 28 December 2020, is irrelevant. I say so because, the applicant seemingly loses sight of the fact that the period from 28 December 2020 to 29 January 2021 is more than 30 days, and that his appeal remains filed out of time.

[39] Despite being alerted about his non-compliance with s 89(2) of the Act and the hurdle he faces in this regard, the applicant did not deal with this aspect in his founding affidavit. It is only in reply that the applicant attempted to make out a case that the appeal was noted timeously.

[40] In this connection, Mr Dicks correctly argues, in my view, that those portions of the replying affidavit accordingly fall to be struck out because those portions contain issues that should have appeared in the founding affidavit, alternatively because they contain new matter. It goes without saying that the respondent is prejudiced in that it cannot respond to such allegations made for the first time in the replying affidavit.

[41] Accordingly, it appears to me that the principles enunciated in the *Stipp* matter⁴ must return to haunt the applicant. No credence can be given to the issues raised in reply by the applicant and which should, as a matter of law, have appeared in the founding papers, allowing the respondent a fair opportunity to deal with them blow by blow in the answering affidavit.

[42] In this premises, I find that the applicant's appeal was filed out of time and as such the application for condonation for failure to prosecute the appeal within 90 days as prescribed by rule 17(25) of the Labour Court Rules and for extension of the same period to enable the applicant to set down the appeal for hearing, is of no consequence. There is simply no appeal, properly so-called, to speak of in the instant matter.

⁴ *Stipp v Shade Centre* 2007 (2) NR 627 at 634 G-H.

Conclusion

[43] The court can only condone an appeal that has been filed late where a condonation application to that effect has been brought. In *casu*, there is no appeal filed in terms of the Act. As such, the application for condonation and reinstatement of the appeal do not properly serve before this court for adjudication in the absence of an appeal duly noted.

[44] In light of the above, it remains for me to say that there is no appeal before me, as there is no application for condonation for the late noting of the appeal. The court cannot by operation of law condone a non-existent document.

Order

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

1. The application is struck from the roll.
2. There is no order as to costs.

T. S. Masuku
Judge

APPEARANCES

APPLICANT: F Bangamwabo
Of FB Law Chambers, Windhoek

RESPONDENT: G Dicks (assisted by G Kopplinger)
Instructed by Kopplinger Boltman Legal Practitioners, Windhoek.

