

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2023/00025
(INT-HC-OTH-2023/00103)

In the matter between:

MELHERIUS HAUKAMBE

APPLICANT

and

NATIONAL DISABILITY COUNCIL OF NAMIBIA
NICOLHAS SHAUN MOUERS

FIRST RESPONDENT
SECOND RESPONDENT

Neutral citation: *Haukambe v National Disability Council of Namibia*
(HC-MD-LAB-APP-AAA-2023/00025) (INT-HC-OTH-2023/00103))
[2023] NALCMD 28 (7 July 2023)

Coram: PARKER AJ

Heard: 23 June 2023

Delivered: 7 July 2023

Flynote: Labour law – Condonation application to condone the late noting of an appeal – Court applying trite principles – Court finding that the applicant has shown good cause – Consequently condonation application granted.

Summary: Labour law – The applicant noted an appeal four days outside the time limit prescribed by s 89(2) of the Labour Act 11 of 2011 – Applying the principles

enunciated by *Balzer v Vries*,¹ the court concluded that the applicant has satisfied the two requisites of good cause – The condonation application was accordingly, granted.

Held, where an appeal has been noted out of the time limit prescribed by s 89(2) of the Labour Act 11 of 2007, the appeal remains on the court roll, except that the court cannot hear it until and unless on good cause shown by the late noting of the appeal is condoned by the court in terms of s 89(3) of the Labour Act.

Held, further, s 89(3) of the Labour Act stands in polar contradistinction to rule 17(25) of the Rules of the Labour Court in terms of which an appeal that has not been prosecuted within 90 days after the noting of such appeal ‘is deemed to have lapsed’.

Held, further, where the court condones the late noting of an appeal, the ninety-day period within which the appeal must be prosecuted in terms of rule 17(25) of the Labour Court Rules begins to run from the date of the condonation.

ORDER

1. The condonation application is granted.
2. The applicant must not later than 4 October 2023 prosecute the appeal.
3. There is no order as to costs.
4. The condonation application is finalised and removed from the roll.

¹ *Balzer v Vries* 2105 (2) NR 549 (SC).

JUDGMENT

PARKER AJ:

[1] This is an application to condone the applicant's late noting of an appeal against the arbitration award made under Case No. CRWK281-21, dated 1 March 2023. The court's power to so condone is derived from s 89(3) of the Labour Act 11 of 2007. The scheme of s 89(3) is this: Where an appeal has been noted out of the time limit prescribed by s 89(2), the appeal remains on the court roll, except that the court cannot hear it until and unless on good cause shown the court has condoned the late noting of the appeal. That is the proper interpretation and application of s 89(3) of the Labour Act.

[2] In that regard, it is important to signalise the crucial point that s 89(3) of the Labour Act stands in polar contradistinction to rule 17(25) of the Labour Court Rules in terms of which an appeal that has not been prosecuted within 90 days after the noting of such appeal 'is deemed to have lapsed'. Accordingly, I accept the submission by Ms Alexander, counsel for the applicant, on the interpretation and application of s 89(3) of the Labour Act. I reject Mr Jones's submission.

[3] It is important to note this: The interpretation I have put on s 89(3) of the Labour Act will not do harm to the court roll, because if the appeal whose late noting has been condoned by the court is not prosecuted within 90 days after the date of the condonation, the appeal is deemed to have lapsed in terms of rule 17(25) of the Rules of the Labour Court. In a self-serving mode, Mr Jones appears to see the word 'lapsed' in s 89(3) of the Labour Act. I do not. The provisions of s 89(3) are clear and unambiguous. There is, therefore, no need to add any words thereto by implication.²

[4] For the applicant to succeed in such condonation application, the applicant must show good cause. It is now well entrenched that the two requisites of good cause are in the first instance establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of

² *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2009 (2) NR 793 (HC).

success on appeal.³ This court is, thus, presented with a neat question: Has the applicant shown good cause?

[5] As to the first requisite, I have considered the applicant's founding papers against the factors suggested by courts.⁴ Having done that, I am satisfied that the applicant brought the condonation application with speed and promptitude, after realising the delay in noting the appeal. In any case, Mr Jones, counsel for the respondent, submitted that the respondent did not take issue with the applicant's satisfaction of the first requisite of good cause. I now pass to consider the second requisite of good cause.

[6] Mr Jones submitted that there were no prospects of success on appeal simply on the following grounds: The appointment of the applicant in August 2015 to the post of Acting Director (ie Acting CEO) of the first applicant was a nullity in terms of s 13 of the National Disability Council Act 26 of 2004. The series of extension of the applicant's acting periods through Council resolutions were done without approval by the responsible Minister. And so, for the first respondent, the nullity of the initial appointment cannot be remedied.

[7] Mr Jones's contention would be valid if the applicant was appointed to the post of Director, as Ms Alexander submitted. The applicant was appointed to the post of acting Director and his tenure was extended from time to time to await the appointment of a substantive Director.

[8] Ms Alexander submitted that the applicant was not relying on s 13 of Act 26 of 2004 to support his case. The applicant's case is, as it was before the arbitrator, simply that there was a contractual employment relationship between the applicant and the first respondent. In that regard the applicant relies on s 1 of the Labour Act 11 of 2007 (the principal Act), read with s 128A, inserted into the principal Act by s 7 of the Labour Amendment Act 2 of 2012.

[9] As I see it, the power of the first respondent to appoint the applicant as Acting Director until a substantive Director was appointed was implicit in the first

³ See *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F.

⁴ See, eg *Owoseb v Transnamib Holdings Ltd* [2018] NALCMD 4 (23 March 2018).

respondent's power to ensure the good administration of the affairs of the first respondent and the effective execution of its functions as contemplated in s 11(a) of the Act 26 of 2004.

[10] In any case, where the administrative act by a public authority inflicts no legal wrong and is not expressly prohibited, then the occasion has arisen for the principle *omnia praesumuntur rite esse acta*, given expression to by *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁵, applies and should take hold.

[11] It was not contradicted during the arbitration that the applicant rendered personal service to the first respondent and he was remunerated for such service by the first respondent. Indeed, the applicant's legal representative at the arbitration submitted to the arbitrator that a contractual employment relationship existed between the applicant and the first respondent in terms of s 1, read with s 128A, of the Labour Act. The arbitrator ought to have considered those provisions. He did not. Yet the Supreme Court tells us that -

'The definitions section of the 2007 Labour Act is intended to assist the trier of fact in resolving disputes concerning who is an employee and who is not. In that process the s 128A presumption also come into play and must be considered together with the definitions section.'⁶

[12] The arbitrator failed to do that which the Supreme Court enjoins triers of fact to do when resolving disputes concerning who is an employee and who is not. The result is that the arbitrator's decision is wrong. He relied on s 13 of the Act 26 of 2004 when the post involved is not the post mentioned in s 13 of that Act. The arbitrator acted as if in our law only an Act that governs the establishment and the administration and management of an entity in question regulates the employment relationship in the entity to the exclusion of the Labour Act 11 of 2007. The arbitrator is wrong. In the instant matter, the first respondent is governed by both the National Disability Council Act and the Labour Act on matters of labour and employment.⁷

⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SC); approved by courts in Namibia, eg *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC).

⁶ *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another* 2016 (3) NR 849 (SC).

⁷ See *HN and Others v The Government of the Republic of Namibia* 2009 (2) 752 (HC).

[13] In all this, the reminder sounded by the Supreme Court in *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another*⁸ is relevant in the instant proceedings:

[46] In my view, the dominant purpose discernible from the scheme adopted in ss 1 and 128A, is the protection of workers from contrivances aimed at circumventing the protection afforded by labour legislation. An arbitrator (and the Labour Court on appeal) considering whether or not an employment relationship exists should bear that in mind.⁹

[14] Accordingly, I find that the applicant has established that there are reasonable prospects of success on appeal (ie the second requisite of good cause). It should be remembered that a finding that reasonable prospects of success on appeal exist does not mean that the appeal will succeed by the hook or crook. It means there is a strong likelihood that the appeal will succeed.

[15] Based on these reasons, I conclude that the applicant has established good cause for the grant of the relief sought. In the result, I order as follows:

1. The condonation application is granted.
2. The applicant must not later than 4 October 2023 prosecute the appeal.
3. There is no order as to costs.
4. The condonation application is finalised and removed from the roll.

C PARKER
Acting Judge

APPEARANCES

APPLICANT: _____ N N ALEXANDER

⁸ *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another* footnote 3.

⁹ *Ibid* para 46.

Of Sisa Namandje & Co. Inc., Windhoek

FIRST RESPONDENT:

J P RAVESCROFT JONES

Instructed by Köpplinger Boltman, Windhoek