

REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

Case Title: MINISTRY OF FINANCE OFFICE OF THE EXECUTIVE DIRECTOR MINISTRY OF FINANCE and THE LABOUR COMMISSIONER JASON PICKARD KAHITIRE KENNETH HUMU	1 st APPLICANT 2 nd APPLICANT 3 rd APPLICANT 1 st RESPONDENT 2 nd RESPONDENT 3 rd RESPONDENT	Case No: HC-MD-LAB-APP-AAA-2022/00068	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 14 July 2023	Delivered on: 4 August 2023	
Neutral citation: <i>Ministry of Finance v The Labour Commissioner</i> (HC-MD-LAB-APP-AAA-2022/00068) [2023] NALC 31 (4 August 2023)			
Results on merits: Merits not considered.			
The order: 1. Condonation is granted to the applicants for their non-compliance with rule 17(25) of the			

Labour Court Rules for the late noting of the appeal and the appeal is reinstated;

2. The arbitrator's decision/ruling handed down on 13 October 2022 is stayed pending the outcome of the labour appeal;
3. There is no order as to costs;
4. The matter is finalised and removed from the roll.

Reasons for orders:

PRINSLOO J:

The parties

[1] The first applicant is the Ministry of Finance, a juristic person with its principal business place at Moltke Street, Windhoek, in the Republic of Namibia.

[2] The second applicant is the Office of the Executive Director, having its principal place of business at Moltke Street, Windhoek in the Republic of Namibia.

[3] The respondents are:

a) The first respondent is the Labour Commissioner, appointed in terms of section 120 of the Labour Act 11 of 2007, with his service address at Kloppers Street, Khomasdal, Windhoek in the Republic of Namibia.

b) The second respondent is Jason Pickard, with his address of service being Brockerhoff & Associates, at 13 Strauss Strasse Windhoek West, in the Republic of Namibia.

c) The third respondent is Kahitire Kenneth Humu, an adult male person employed at the Labour Commissioner, with his service address being Kloppers Street, Khomasdal, Windhoek in the Republic of Namibia.

Relief claimed by the applicants

[4] The applicants in their amended notice of motion are seeking (a) condonation for the non-compliance with rule 17 (25) of the Labour Court Rules in that they failed to prosecute their appeal within 90 days after the arbitration award was handed down, (b) the reinstatement of the labour appeal instituted by the applicants which lapsed on 1 February 2023, (c) the final relief which the applicants are claiming is that in the event that the applicants' appeal is reinstated, the applicants pray that this court temporarily suspends the operation of the arbitration award handed down on 13 October 2022 by the third respondent until the determination and finalisation of the appeal.

[5] The applicants' initial application for reinstatement of the appeal was filed on 3 April 2023 but was withdrawn on 19 May 2023. After seeking advice from instructed counsel, the applicants filed a new application for reinstatement. This time, they pertinently focused on the second requirement of good cause for the late filing of the appeal by highlighting their prospects of success on appeal. Additionally, they requested relief in the form of a stay of execution for the judgment/award given by the arbitrator.

Background

[6] On 13 November 2020, the second respondent (Mr Pickard) referred a dispute of unfair dismissal to the Office of the Labour Commissioner. The arbitration proceedings were conducted from 6 to 8 April 2022, following which the award was handed down by the third respondent (the arbitrator) on 13 October 2022. The arbitrator made the award to the effect:

1. That the 2nd respondent's dismissal was both procedurally and substantively unfair.
2. That the 2nd respondent should be reinstated to the position he held and be awarded a total amount of N\$961 614.00 by the applicants.'

The application for reinstatement

[7] Dissatisfied with the outcome of the arbitration, the applicants noted an appeal on 31 October 2022, Mr Pickard opposed the appeal on 9 December 2022. On 2 November 2022, the applicants requested the first respondent (the Labour Commissioner) to transmit the record of proceedings within 21 days after applicants noted the appeal. The first respondent only transmitted the record of proceedings on 14 December 2022, this being approximately 40 days

after the award was handed down. Following the transcription of the record the applicants' legal practitioner made copies of the record on 22 January 2023.

[8] The reason advanced by the applicants for the late copying of the record of proceedings is because the applicants' legal practitioner was under the 'mistaken' impression that because the court's recess was during 15 December 2022 to 15 January 2023, the office of the registrar was also similarly on recess. On 23 January 2023, the applicants applied for the assignment of hearing dates of the appeal. At this point the appeal had not yet lapsed. On 25 January 2023 applicants were informed that the third respondent's legal practitioner and the applicants' instructing legal practitioner attended to the office of the registrar for assignment of the hearing dates. On even date the assistant registrar did not assign hearing dates because the applicants' legal practitioner did not file proof of service of the intended appeal.

[9] The applicants aver that the assistant registrar postponed the matter for the assignment of dates to 1 February 2023. The required proof of service for the assignment of dates was served on the third respondent's legal practitioner on 31 January 2023. On 1 February 2023, the applicants' legal practitioner attended to the office of the assistant registrar for the assignment of the hearing dates, however, the third respondent's legal practitioner was not in attendance. Subsequently, the assistant registrar struck the matter from the roll on account of the applicants' only giving the third respondent one day's notice of the assignment of the hearing dates, and on account of the record being filed out of time by the first respondent. According to the applicants, the assistant registrar did not have the power to refuse to assign the parties hearing dates, on account of the second respondent only receiving one day's notice for the assignment of hearing dates as well as the first respondent only filing the record more than 21 days after the applicants' notice of appeal. The applicants state that the assistant registrar can only refuse to schedule hearing dates if there is non-compliance with rule 17, specifically sub-rules (10), (11), and (12). However, the applicants assert that they have complied with those sub-rules.

[10] Preceding the filing of the reinstatement application on 4 April 2023, the applicants engaged the third respondent in terms of rule 32(9) and filed a rule 32(10) report. This was two months after the applicants' appeal lapsed. The applicants advanced an extensive explanation for their delay

in filing the application for reinstatement, the details of which I will not repeat for purposes of this ruling. The applicants, however, endeavoured to explain the delay for the entire period. The

bottom line is that it was only from 8 March 2023 that the instructing legal practitioner commenced preparing the current application.

[11] On 13 March 2023, the draft of the reinstatement application was finalised but was only signed and commissioned on 29 March 2023. The first reinstatement application was filed on 4 April 2023, and the third respondent filed his answering papers to which the applicants replied. The applicants instructed counsel on 9 May 2023 to draft heads and to prepare to argue the matter. However, as indicated above, the applicants were informed by instructed counsel that the first reinstatement application was defective and advised that the applicants withdraw the first reinstatement application and file a fresh one. This culminated in the drafting of the current application. Counsel commenced drafting the affidavit on 13 May 2023 and finalised the draft on 19 May 2023. However, the applicants received instructions from the instructed counsel to provide him with further documentation, more specifically relating to the issue of the stay of execution.

[12] The applicants did not have the necessary information available and had to obtain it from Mr Denvor Mouton, the Human Resource Practitioner, employed at the applicants' office, which they only received on 31 May 2023. Mr Mouton was booked off sick for the period 21 May 2023 until 26 May 2023.

Prospects of success

[13] The applicants submit that they enjoy prospects of success should the appeal be reinstated as the third respondent erred by failing to take into account that if a staff member is absent from work without permission for more than 30 consecutive days, that staff member shall be deemed to have been discharged from the Public Service, in terms of s 24 (5)(a)(i) of the Public Service Act 13 of 1995 (the Act). Consequently, if a staff member is absent from work for a conservative period of 30 days and without the required permission or leave from the Executive Director, Ministry or agency, the staff member is deemed to have been dismissed by operation of the law.

[14] Applicants aver that they have discharged the said onus in proving that they enjoy prospects of success.

Irreparable harm and balance of convenience

[15] The applicants submit that if the Ministry pays the N\$961 614.16 to the second respondent, and the appeal succeeds, the second respondent would not be able to repay the amount. If the appeal fails, they would be in a position to pay the said amounts to the second respondent, plus any amounts owing to him due to the stay of the arbitration award. The applicants would, therefore, potentially suffer significant harm on account of the second respondent's inability to repay the said amounts if the appeal succeeds.

Second respondent's answering affidavit

[16] According to the second respondent, the reinstatement application must fail because the applicants do not ask for condonation even though condonation is a requirement. Additionally, reinstatement is a consequential relief to the granting of condonation for non-compliance with the Labour Court Rules. The second respondent contends that the applicants misconstrue the provisions of the Act in that they fail to understand that the Public Service Staff Rules form part of the Act and that s 35 (3) of the Act and the Staff Public Service Staff Rules are binding on the applicants.

[17] The second respondent maintains that during the arbitration hearing, the only evidence which was led was evidence from himself, and that evidence was not contradicted. Hence the factual findings made by the arbitrator in the circumstances. As a result, the applicants do not enjoy any prospects of success on appeal. According to the second respondent, the explanation advanced by the applicants is unreasonable, given the fact that a senior legal practitioner represents the applicants. He contends that the period of delay between 15 January 2023 and 22 January 2023 is unexplained and thus not accounted for.

[18] According to the second respondent, he had 21 days from receiving a copy of the record to file his grounds of opposition. The 21 days lapsed on 12 February 2023 and the 90 day period expired on Monday, 29 January 2023. Subsequently, on 22 January 2023, the applicants should have applied for an extension of the 90 day period as provided by rule 17(25) of the rules. However, they ignored the rules and adopted a procedure that was contrary to the rules of this Court. He is of the view that on 23 January 2023, before the expiration of the time provided for by rule 17(16)(b), the applicants purported to act in terms of rule 17 (17) of the Labour Court Rules. This approach is wrong because the request for the assignment of dates could only be

made after he had a chance to file his grounds of opposition.

[19] The second respondent avers that the applicants, on 25 January 2023, without giving the five days' notice as required by rule 17 (17), purported to attend the registrar's office to request hearing dates. This is another disregard of the rules, and this is an intentional act designed to subvert the rules of the Court. The second respondent further contends that on 1 February 2023, there was no appeal as the 90 days to prosecute the appeal had lapsed and condonation is thus required due to the non-compliance with rule 17 (25).

[20] The second respondent believes that the applicants did not provide a satisfactory reason for their inactivity and that the explanation given by the applicants is not truthful or reasonable. However, contended that the applicants can make a temporary offer, such as reinstating the second respondent so he can earn an income. Moreover, there is no justification for the applicants to refuse him employment.

[21] The second respondent contends that he is unemployed and is experiencing grave financial difficulties. Whereas on the other hand, the applicants face no harm. Any potential harm can be ameliorated by suspending him and charging him with the 'alleged misconduct', which they on their own admission, have known about since May 2018.

Submissions on behalf of the applicants

[22] As regards to prospects of success, the applicants referred the Court to the matter of *S v Smith*,¹ wherein the Court explained the test of prospects of success on appeal as follows:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he

has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is a mere possibility of success that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[23] The applicants further rely on *Njathi v Permanent Secretary, Ministry of Home Affairs*.² Mr

¹ *S v Smith* 2012 (1) SACR 567 (SCA).

Kasita submitted that the applicants enjoy prospects of success on account of the following:

- a) Section 24(5)(a)(i) of the Public Service Act. The section creates a deeming provision, which, if the jurisdictional facts are proved, would operate by operation of the law.
- b) The deeming provision comes into operation if it is proven that the respondent was absent from work, and without the permission of the Executive Director, for a consecutive period of 30 days.
- c) The documentary evidence and the rule 20 submissions that were before the third respondent showed that the second respondent was in custody from 24 May 2018 until 17 August 2018. Consequently, he was absent from work for a total of 61 days.³
- d) Considering the fact that the second respondent was absent for a consecutive period of 30 days, and without being granted leave, he was deemed to have been discharged from the public service by operation of the law.
- e) Consequently, the third respondent erred by failing to consider that the second respondent was absent from work for a consecutive period of 30 days and without having permission from the Executive Director.

[24] For the preceding reasons, Mr Kasita submits that applicants enjoy good prospects of success on appeal.

[25] As I indicated above, the applicants are asking the court to temporarily suspend the operation of the arbitration award. To that end, Mr Kasita referred the Court to the matter of *Samicor Diamond Mining v Hercules*,⁴ where the Court discussed the test in applications for a stay of execution pending an appeal as follows:

‘The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted; the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused; the prospect of success on appeal . . .’

[26] The applicants were ordered to compensate the second respondent an amount of N\$961 614.16. The applicants submit that they will suffer irreparable harm if the stay is not granted.

² *Njathi v Permanent Secretary, Ministry of Home Affairs* 1998 NR 167 (LC) at 170, in addition, the rationale of deeming provision is set out in *Mkhwanazi v Minister of Agriculture and Forestry*, KwaZulu 1990 (4) SA 763 (D) at 768-769.

³ Page 44 of Appeal record 1.

⁴ *Samicor Diamond Mining v Hercules* NR 2010 (HC) 304.

They will suffer prejudice if they are ordered to pay the money to the second respondent, and in the event the appeal succeeds, the second respondent would not be in a position to repay the said amount. More importantly, the second respondent did not dispute the fact that he would not be able to repay the said amounts. Furthermore, the second respondent indicated in his answering affidavit that he is unemployed.

[27] As regards the issue of reinstatement, Mr Kasita argued that on application of section 24(5)(a)(i) of the Public Service Act, if the Court finds that the applicants enjoy prospects of success on appeal, they submit that the second respondent was discharged by operation of the law and for this reason the Court would not be in a position to reinstate the second respondent, as such reinstatement would be contrary to the applicable statutes. In the premise, Mr Kasita asked the Court to suspend the operation of the arbitration award pending the determination of the appeal.

[28] With regard to the allegation advanced by the second respondent in his answering papers that the applicants have failed to comply with the arbitration award. The applicants denied that they acted dishonestly or fraudulently in not implementing the arbitration award. In support of their submissions, they rely on *Petrus Shaanika and 10 Others v The Windhoek City Police*,⁵ wherein the Supreme Court indicated that a party shall only be barred from accessing court if they have acted dishonestly or fraudulently and not merely unlawfully. It is their submission that the second respondent failed to demonstrate that the applicants have acted dishonestly and fraudulently in this application for reinstatement.

Submissions on behalf of the second respondent

[29] The second respondent maintains in his heads of arguments that the applicants' reinstatement application must fail in the absence of condonation being sought. In amplification of his argument the Court was referred to *Beukes and Another v Swabou and Others*,⁶ where Langa AJA held the following:

'In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of flagrant non-compliance with the rules which demonstrate a glaring and

⁵ *Petrus Shaanika and 10 Others v The Windhoek City Police* 2013 (4) NR 1106 (SC).

⁶ *Beukes and Other v South West Africa Building Society (SWABOU) and Others* (SA 10 of 2006) [2010] NASC 14 (05 November 2010) para 20.

inexplicable disregard for the processes of the Court.’

[30] Mr Ketjijere submitted that there had been a glaring and inexplicable disregard for the process of the Court by the applicants. Thus prospects of success on the *Beukes* authority should be disregarded. The applicants belatedly sought an amendment to their notice of motion in an attempt to introduce a new cause of action which is condonation in this instance. He continues to submit that the late amendment is an afterthought that came about due to the defence raised by the second respondent.

[31] The second respondent argues that the applicants set the matter down for a hearing without filing an application for leave to amend their notice of motion in terms of rule 52(4) of the High Court Rules. Therefore such an application is not before this Court, and the Court must thus only deal with the reinstatement application. Mr Ketjijere avers that the applicants’ deponent in his replying affidavit stated that, due to his legal counsel’s oversight, their notice of motion filed on 2 June 2023 did not contain a prayer for condonation for non-compliance with rule 17(25). Furthermore, in the absence of a confirmatory affidavit by the legal practitioner (Mr Jabulani Ncube), the allegation of oversight by their legal counsel amounts to hearsay evidence and is inadmissible.

[32] In amplification of his argument, Mr Ketjijere referred the Court to the matter of *Enviro-fill Namibia v Council for the Municipality of Tsumeb*,⁷ where Justice B. Usiku restated the legal principles relating to amendment of pleadings as follows:

‘The general rule is that the court may at any stage before judgment, grant leave to amend a pleading. However, leave to amend cannot be obtained merely for the asking. The litigant seeking to amend, craves an indulgence and must offer some explanation why the amendment is required, and more especially when the amendment is sought at a late stage, as satisfactory account for the delay must be given. Where a proposed amendment will not contribute to the determination of the real issues between the parties, it ought be granted.’

[33] The court was also referred to the matter of *Lewis v Draghoender*,⁸ wherein Ueitele J held as follows:

‘In the present matter it is common cause that Lewis did not apply to court for the court to

⁷ *Enviro-fill Namibia v Council for the Municipality of Tsumeb* (I 6045/2014) [2020] NAHCMD 61 para 16.

⁸ *Lewis v Draghoender* (HC-MD-LAB-AAP-AAA-2021/00042 (INT-HC-EXTTIME-2021/00370) [2022] NALCMD 41 (22 July 2022) para 37.

condone its non-compliance with the rule (17)(25), it therefore follows that the court cannot, in the absence of an application for the condonation of the non-compliance with the rules of court, consider the question of whether or not to reinstate the lapsed appeal.’

[34] For the above reason, Ueitele J held that, for a court to consider the merits of an application for reinstatement of a lapsed appeal, it must first consider a preceding application for condonation. He further held that only once condonation is granted, can reinstatement follow.

[35] To summarise, Mr Ketjirere argues that the reinstatement application is flawed because it doesn't include a request for condonation for the non-compliances, it lacks material facts of the underlying culpable conduct that this Court must condone, and the applicants do not enjoy any prospects of success.

[36] With regards to the explanation advanced by the applicants that their instructing legal counsel was inundated with work, this explanation is not sufficient as it is innate in the business of lawyers to be busy. The Court was referred to the matter of *Minister of Urban and Rural Development v Witbooi*,⁹ where Masuku J held that:

‘The timeless words, spoken in 54BC were given a new lease of life in *Nedbank v Louw*¹⁰ Cicero said:

“The reason for the lateness, he said, was pressure of work and he apologised. Now although an apology seems to express good manners, it is not a basis for condonation. The pressure of work in the life of a legal practitioner is nothing new.”

[37] It is Mr Ketjijere’s submission that the second respondent continues to suffer more prejudice and irreparable harm if the execution of the arbitration award is stayed. Thus the matter must be determined in favour of the second respondent as per section 89(7)(b) of the Act.

[38] Having set out the arguments by both parties, I will now proceed to set out the legal principles relevant to this matter.

The applicable legal principles and discussion

⁹ *Minister of Urban and Rural Development v Witbooi* 1965 (2) SA 135 (AD) at 141C-E).

¹⁰ *Nedbank v Louw* 1965 (2) SA 135 (AD) at 141C-E).

[39] As the Supreme Court noted, there are two general considerations for a condonation application to succeed. Firstly, there must be a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of success on appeal.¹¹ There is some interplay between these two broad considerations. For example, good prospects of success may lead to a reinstatement application being granted even if the explanation is not entirely satisfactory.¹²

[40] Applying these trite principles to the facts of the application, while some of the reasons advanced by the applicants' legal practitioner for the late filing of the reinstatement applications may be criticised as being somewhat clumsy or not entirely acceptable, certainly not all the failures may result in the reinstatement application being dismissed.

[41] To his credit, the applicant's legal practitioner constantly endeavoured to resolve the issues pertaining to the reinstatement application and gave a detailed explanation for the entire period of the delay. Moreover, the absence of an entirely satisfactory explanation is ameliorated by the prospects of success that appear to me to be good. On this aspect and tentatively speaking, my prima facie view is that on a pure point of law as to the ambit and scope of section 24(5)(a)(i) of the Public Service Act as well as its application to the facts of the case, another court may come to a conclusion different from the one arrived at by the arbitrator.

[42] As to the question of whether a lapsed labour appeal may be reinstated, the second respondent fiercely argued that it could not. There can be no doubt that a lapsed appeal may be revived by a successful application for condonation and reinstatement application. The second respondent argued that the reason why the appeal in this case should not be reinstated was because 'the application for reinstatement is defective in that it lacks, the relief for condonation with the non-compliances, it lacks material facts of the underlying culpable conduct that this Court must condone and the applicants do not enjoy any prospects of success' and not because the Labour Act had not given the Court the power to reinstate a lapsed appeal.

[43] In the result, it has been found that although the explanation for the failure to prosecute the appeal was not entirely satisfactory, there appear to be good prospects of success of the appeal on the merits.¹³ Moreover, the view that a lapsed labour appeal can never be reinstated

¹¹ *Sun Square Hotel (Pty) Ltd v Southern Sun Africa* (SA 26-2018) [2019] NASC (9 December 2019) para 13.

¹² *Ibid.*

¹³ *Namibia Power Corporation (Pty) Ltd v Kaapehi* (SA 41/2019) [2020] NASC (29 October 2020).

is substantially wrong. In light of this conclusion, it has become unnecessary to decide some of the other points of argument raised by counsel on both sides., such as the argument based on the allegation that the applicants' legal counsel was swamped with work and that being one of the reasons for the failure to prosecute the appeal within the required 90 day period and the contention that the applicants should have applied for condonation additional to the application for reinstatement advanced on behalf of the second respondent.

[44] Given that the amount involved is substantive, I am of the view that the applicants must be afforded an opportunity to have the arbitrator's decision decided by the Labour Court; the appeal must thus be reinstated.

Order

[45] As a result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Second Respondent
T Kasita Instructed by Office of the Government Attorneys, Windhoek	R Ketjijere of Brockhoff & Associates Windhoek