

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA LABOUR DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-MOT-GEN-2023/00032

In the matter between:

REHOBOTH TOWN COUNCIL

APPLICANT

and

CHRISTOPH /UIRAB

FIRST RESPONDENT

DIONYSIUS LOUW N.O

SECOND

RESPONDENT

LABOUR COMMISSIONER

THIRD

RESPONDENT

Neutral citation: *Rehoboth Town Council v /Uirab* (HC-MD-LAB-MOT-GEN-2023/00032) [2023] NALCMD 36 (18 August 2023)

Coram: Schimming-Chase J

Heard: 28 July 2023

Order: 18 August 2023

Flynote: Practice — Applications for condonation — principles restated.

Practice — Labour Court — Stay of execution of arbitration award pending appeal – Section 89 (6) and (7) of Labour Act — Balance of irreparable harm favours the applicant.

Summary: During February 2019, the first respondent referred a dispute for non-payment of his notice period, unauthorised deductions of leave days, and damages for loss of property against the applicant, to the office of the Labour Commissioner.

Following arbitration, the arbitrator on 15 September 2022, issued an award in excess of N\$1 million in favour of the first respondent. The first respondent on, 26 October 2022, filed the award with the Labour Court, which award was made an order of court. The applicant then during January 2023 noted an appeal against the arbitration award. In the meantime, the applicant launched the present application seeking condonation for the late noting of its appeal, and an order suspending the execution and any other process emanating from the arbitration award, pending appeal.

The applicant contends that it faced financial difficulties, and as a result its erstwhile legal practitioner withdrew representation. The applicant was forced to seek the assistance of the Government Attorney to note the appeal. The applicant further contends that the arbitrator made perverse findings when he awarded damages to the first respondent, which damages could not have been awarded because the first respondent was never dismissed from his employment. The applicant contends that it enjoys prospects of success on appeal, and that as a result, considering it is a town council, the balance of irreparable harm favours it; as it may suffer service interruption if the sum of the award is paid, and the applicant may not be able to recoup the award against the first respondent should it succeed on appeal.

The first respondent denies that the applicant enjoys any prospects of success, contending that the applicant failed to give a detailed, accurate and full explanation for its extensive delay in noting the appeal. As a result of the

applicant's failure to pay him during his notice period, he suffered the loss of his motor vehicle and his life came to a standstill.

Held that, during an inquiry on condonation, the question is whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for condonation is not *bona fide*.

Held that, the application for condonation by the Town Council is rather lacking in its disclosure to court as to the delay in bringing the application, however, the Town Council has arguably demonstrated that on the issue of the quantum of the award, it may enjoy prospects of success on appeal, and that although delayed, gives rise to a probable defence against the award.

In the result, the application for condonation and stay of the execution of the arbitration award succeeds.

ORDER

1. The applicant's application for condonation is granted.
2. The execution of the arbitration award dated 15 September 2022 under case number CRWK 215-19 is suspended pending finalisation of the appeal.
3. There shall be no order as to costs.
4. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

[1] The applicant is the Rehoboth Town Council ('the Town Council'), a juristic person duly established in terms of s 2 of the Local Authorities Act 23 of 1992 (as amended), with its principal place of business at the corner of Banhoff and Niklaas Olivier Streets, Rehoboth, Republic of Namibia. The Town Council was the losing party in a labour dispute that was referred for conciliation by its erstwhile Chief Executive Officer, the first respondent in this application Mr Christoph /Uirab. The labour dispute resulted in an arbitration award in the amount of N\$1 031 336,37 on 15 September 2022, made by the second respondent in his capacity as the designated arbitrator.

[2] In the present application, the Town Council applied for an order condoning its non-compliance with rule 17(4) of the rules of this court for the late filing of the notice of appeal against the arbitration award. The Town Council also seeks an order in terms of s 89(7) read with s 89(9)(a) of the Labour Act 11 of 2007 ('the Act'), that the execution of the arbitration award, and all other processes issued pursuant to this award, be suspended pending the appeal which was noted by it (the Town Council) on 30 January 2023 under case number HC-MD-LAB-APP-AAA-2023/00007.

[3] The factual matrix of this matter is the following. Mr /Uirab was employed on a five-year fixed-term contract. He resigned and a dispute arose as to the calculation of his remuneration. On 27 February 2019, Mr /Uirab referred a labour dispute for conciliation or arbitration in terms of ss 82(7) and 86(1) of the Act. The referral relates to a claim for non-payment of his notice period, unauthorised deductions of leave days, and damages for loss of property.

[4] According to the Town Council, the case of Mr /Uirab is that, Mr /Uirab issued it with a notice of resignation on 20 June 2018, stating that the effective

date of resignation would be 26 November 2018. On 13 July 2018, the Town Council informed Mr /Uirab that his services would end on 20 July 2018, that it waived the notice period requirement and *in lieu* thereof, Mr /Uirab would be entitled to remuneration for the work he would have done during the notice period.

[5] At the conclusion of the arbitration, the second respondent ordered the applicant pay to the first respondent:

- a) Notice pay of N\$219 110 (N\$ 54 777,47 being the monthly rate for four months);
- b) Leave gratuity of N\$161 856 (N\$ 54 777,47 /4.333 / 5 x 64 days);
- c) Prorate bonus of N\$10 675,61;
- d) NHE arrears of N\$102 967.90; and
- e) Motor vehicle loss of N\$536 726,86.

[6] The sum of the arbitration award was thus N\$1 031 336,37, plus interest.

[7] It is common cause between the parties that the Town Council noted an appeal against the arbitration award, and that the appeal was noted out of time. The Town Council presented the following explanation for the four-month delay in noting the appeal against the arbitrator's award, which was made an order of court on 26 October 2022.

[8] The Town Council states that it was represented during the arbitration proceedings by Ms Gebhardt of Ileni Gebhardt and Co. Inc. During September 2022, it terminated the services of Ms Gebhardt, one of the reasons being that it proved too costly to have Ms Gebhardt represent them in litigious matters.

[9] As a result of the financial difficulties it faced and following the award on 15 September 2022, the Town Council sent a letter to the Office of the Government Attorney, requesting legal assistance for the noting of an appeal against the arbitration award, and other litigious matters before court.

[10] On or about 11 November 2022, this matter was apparently assigned to one Mr Ndamonao Ilovu in the Office of the Government Attorney. Upon his perusal of the file, Mr Ilovu realised the appeal had not been noted and instructed Ms Gebhardt to do so – this included instructions to represent the Town Council in other litigious matters, and that all invoices of Ms Gebhardt would forthwith be settled by the Government Attorney.

[11] Ms Gebhardt was then briefed on 11 November 2022, and the Town Council was informed of this on 15 November 2022. On 28 November 2022, Mr Ilovu contacted Ms Gebhardt requesting her to render assistance to the Town Council as per the brief to avoid any further delays.¹ On 6 December 2022, the Government Attorney cancelled the brief of Ms Gebhardt, due to the fact that she refused to take any further instructions until at least 70 percent of her existing outstanding invoices were settled. The Town Council states that it could not meet such demand.

[12] On 6 December 2022, the Government Attorney instructed the current legal practitioners of record, Andreas-Hamunyela Legal Practitioners, to represent the Town Council. These briefs apparently did not contain any supporting documents, as these documents were still in its possession, so the Town Council contends.

[13] Mr Hamunyela of Andreas-Hamunyela Legal Practitioners was at the time engaged in a High Court trial from 5 December 2022 to 9 December 2022, and the Town Council only sent full briefs on 9 December and 12 December

¹ Mr Ilovu deposed to a confirmatory affidavit.

2022. Mr Hamunyela deposed to a confirmatory affidavit.

[14] Between 15 December 2022 and 09 January 2023, the offices of the Town Council's legal practitioners were closed for the holidays, and although Mr Hamunyela considered the record in this matter, he could not consult the Town Council, as its employees also went on holiday. The Town Council further laments that most of the officials, with knowledge of this matter, are no longer in the employ of the applicant.

[15] Mr Hamunyela was further engaged in another labour appeal hearing between 10 January and 13 January 2023; and further details engagements that prevented him from preparing the notice of appeal, which resulted in the appeal being noted only on 30 January 2023.

[16] Mr /Uirab avers the award was served on the Town Council on 15 September 2022, and that on the version of the Town Council, it only sent correspondence which is not attached to the papers, to the Office of the Government Attorney on 4 October 2022, about 19 days later, evincing the negligent attitude of the Town Council.

[17] Mr /Uirab's opposition relates mainly to the unexplainable dilatory conduct of the Town Council in noting the appeal, which in these particular circumstances are flagrant enough for dismissal of the condonation application without considering prospects of success.

[18] By the time Mr Ilovu was assigned the matter, the appeal had already lapsed and yet Mr Ilovu did not himself attend to the appeal. This aspect is not at all canvassed in the founding papers, and this once more illustrates the Town Council's lackadaisical approach in handling the matter, so contends Mr /Uirab.

[19] After Ms Gebhardt communicated her refusal to accept any further

instructions on 14 November 2022, the Government Attorney only on 6 December 2022 cancelled her mandate and instructed alternative counsel. This time period is similarly completely unexplained and Mr /Uirab contends that the unexplained time period affects the *bona fides* of the application.

[20] Mr /Uirab took exception to the failure to undertake any work or provide instructions during the holiday. He pointed out that the obligations of a litigant in the labour court do not cease during the holidays of December and January; and that the fact that the Town Council fails to even identify who the relevant employees are who took leave, also negatively affects the Town Council's application.

[21] By 9 January 2023, the Town Council was already late with its appeal by more than 90 days, yet it made no averments as to any inquiry made to its legal practitioners. In any event, Mr /Uirab submitted that its legal practitioners were alternatively engaged, again without further explanation, and this is not a reason for the non-compliance with the rules of court.

[22] Therefore, and given time between 15 September 2022 and 30 January 2023, and the fact that labour matters should be dealt with expeditiously, the disregard of the rules of court by the Town Council was wilful and flagrant. Mr /Uirab considers the apology for the non-compliance with the rules of court to be of no moment, as it did not properly explain the reasons for its non-compliance.

[23] In addition to the condonation, as alluded to earlier, the Town Council also seeks an order staying the execution of the arbitration award and all other processes, pending finalisation of the appeal. Essentially the grounds of appeal are that the arbitrator erred in law in all the findings made in support of the arbitration award.

[24] The Town Council places great reliance on what it contends to be the limitation of its financial resources in not bringing the present application at an

earlier stage. The Town Council admits service of the award on 15 September 2022. It is submitted further that the award is for a substantial amount of money, and it would suffer great prejudice if the award had to be paid to Mr /Uirab pending appeal, as he does not have sufficient security, should the Town Council prove successful on appeal. Should the award not be stayed, the Deputy Sheriff may attach the account of the Town Council and pay it over to Mr /Uirab, which attachment would have catastrophic consequences to the operations of the Town Council, including service delivery to the residents of Rehoboth.

[25] Mr /Uirab submits that the present matter is not the first labour matter that the Town Council is involved in. The mere say-so of financial limitations is insufficient, as it failed to present any documents or even explain under oath what the financial constraints are. In fact, the Town Council failed to provide a detailed, full and accurate explanation for its non-compliance, and that the application should be dismissed on this ground alone.

[26] Mr /Uirab denies the Town Council has any prospect of success on appeal, and that if no prospects exists, any condonation by the court is a *brutum fulmen*. The failure by the Town Council to pay his salary resulted in his vehicle being sold in execution, and that its failure to pay him after waiving his notice period, resulted in his life coming to a financial standstill.

[27] The court's power to condone non-compliances is derived from s 89(3) of the Act. 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

[28] It is trite that a party seeking condonation must furnish a satisfactory

² *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) para 1.

explanation for the non-compliance, explain the failure to act timeously and show that the default was not willful.³ Damaseb JP, writing for this court in *Telcom Namibia Limited v Nangolo and Others*,⁴ distilled the following principles from judgments of the courts as regards applications for condonation:

- a. It is not a mere formality and will not be had for the asking.⁵ The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.⁶
- b. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.⁷
- c. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.⁸
- d. The degree of delay is a relevant consideration.⁹
- e. The entire period during which the delay had occurred and continued must be fully explained.¹⁰
- f. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.¹¹ (Legal practitioners are

³ *Bokomo Namibia Pty (Ltd) v Shivute* (HC-MD-CIV-ACT-MOT-GEN-2020/00589) [2022] NAHCMD 345 (12 July 2022) para 14.

⁴ *Telcom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012)

⁵ *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 12.

⁶ *Father Gert Dominic Petrus v Roman Catholic Archdiocese*, SA 32/2009, delivered on 09 June 2011, para 9.

⁷ *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 13.

⁸ *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5.

⁹ *Pitersen-Diergaardt v Fischer* 2008(1) NR 307C-D(HC)

¹⁰ *Unitrans Fuel and Chemical (Pty) Ltd v Gove –Co carriers CC* 2010 (5) SA 340, para 28

¹¹ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B;

expected to familiarise themselves with the rules of court).¹²

- g. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of court is flagrant and gross, prospects of success are not decisive.¹³
- h. The applicant's prospects of success is in general an important though not a decisive consideration. In *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*¹⁴ Hoexter JA pointed out¹⁵ that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
- i. If there are no prospects of success, there is no point in granting condonation.¹⁶

[34] Fundamental to the consideration of the application is the issue of good cause, that is, has the applicant properly explained its dilatory conduct. 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 success on

Moraliswani v Mamili 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.

¹² *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para 47.

¹³ *Vaatz: In re Schweiger v Gamikub (Pty) Ltd* 2006 (1) NR 161 (HC), para; *Father Gert Dominic Petrus v Roman Catholic Diocese*, case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.

¹⁴ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others* 1985 (4) SA 773 (A)

¹⁵ *Ibid* at 789I-J

¹⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

appeal.¹⁷

[35] The Town Council admits service of the order making the arbitration award an order of court on 26 October 2022, as well as receipt of the award made on 15 September 2022. While the Town Council only sought assistance of the Government Attorney for legal representation on 4 October 2022, when an answer was received - the delay until 11 November 2022, when the matter was assigned to Mr Ilovu is not explained, I say so, bearing in mind that Mr Ilovu deposed to a confirmatory affidavit, and it would be well within the knowledge of the deponents what transpired during this period.

[36] The further delay between 11 November 2022 and 28 November 2022, when Ms Gebhardt was briefed and instructed is similarly shrouded in mystery, as it is evident from the replying affidavit of Mr Windswaai, on behalf of the Town Council, that Ms Gebhardt already on 14 November 2022 communicated her decision not to act in the absence of the substantial payment of her outstanding fees. It took the office of the Government Attorney once more until 6 December 2022, to cancel the mandate of Ms Gebhardt.

[37] Then, on 6 December 2022, Mr Hamunyela was instructed and engaged until 9 December 2022, and even if accepted, it is not explained why the engagement of its legal practitioner prevented it from submitting detailed briefs in the meantime.

[38] The Town Council further does not take the court into its confidence by informing the court who the staff members were who were on leave during this time period – or who of the staff members with the necessary knowledge resigned, and what knowledge they may have regarding this matter. Although the Town Council seems to seek to address this issue in reply.

¹⁷ *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) para 1.

[39] I deal with this issue cautiously, as the issue of the appeal is not present before this court. It is however trite that in the assessment of prospects of success, the court must consider the record in question.

[40] The gravamen of Mr Hamunyela's argument on behalf of the Town Council laid against the quantum of the arbitrator's award. Mr Hamunyela argued that Mr /Uirab bought a motor vehicle from Standard Bank Namibia valued at N\$536 726,86, and that Mr /Uirab made payments to Standard Bank Namibia in the amount of N\$254 521, and that despite Mr /Uirab seeking an order for damages in the amount of N\$282 206,62, the arbitrator still awarded the sum of N\$536 726,86 to Mr /Uirab.

[41] Further, Mr Hamunyela argued that /Mr Uirab was alleged to have been in arrears on his NHE house payments in the amount of N\$102 967,90 and that the arbitrator awarded to the Mr /Uirab the sum of N\$102 967,60. It was the argument of Mr Hamunyela that the sum for payment in relation to the house and vehicle amounts to damages, and that the arbitrator was not in law permitted to make such an award as Mr /Uirab was not dismissed.

[42] It is noted that the Town Council, by extension, forms part of local government. The explanation proffered by the Town Council that its financial position did not allow the instruction of private counsel is untenable and must be rejected. In this regard it was held in *Swakopmund Uranium (Pty) Ltd v Kalipa*,¹⁸ that:

'Lack of funds to pay fees of the legal practitioner in order for the latter to draft the pleadings in my view, cannot justify the non-observance of the rules – nor can it be accepted by the court as sufficient and a detailed cause for the delay in seeking condonation.'

[43] The Supreme Court as recently as July 2023, in *Minister of Safety and*

¹⁸ *Swakopmund Uranium (Pty) Ltd v Kalipa* (LCA 41 2014) [2015] NALCMD 28 (04 December 2015).

Security & 5 others v Kennedy & another,¹⁹ stated:

[22] The non-compliance(s) in this matter constitute a flagrant disregard of the rules of court. The record was filed outside the three months as prescribed by the rules of this court. To crown it all, the condonation application was lodged quite late and the reason therefor inexcusable. The Government Attorney's office being poorly staffed and its lawyers being overworked is not a satisfactory explanation for the inordinate delay. The matter could just as well and with great ease have been outsourced to a legal practitioner in private practice. . .

[23] We have in the past cautioned that dereliction of duty by a party's legal representative will be visited upon a litigant in circumstances where non-compliance with the rules has been glaring, flagrant and inexplicable. With its incomparable resources, the Government has to lead by example when it comes to litigation in the courts.'

[44] The law on condonation applications is trite. The factors considered in an application for condonation will be based on the surrounding circumstances of the case.²⁰ The court in *Telecom Namibia Ltd v Michael Nangolo & others*,²¹ restated the settled legal principles and factors that a court will take into account when exercising its discretion notwithstanding that the respondents are not opposed to condonation.²²

[45] A party seeking condonation must furnish a satisfactory explanation for the non-compliance, explain the failure to act timeously and show the default was not willful. In *Beukes and Another v South West Africa Building Society (SWABOU) and Others*²³ this court held that:²⁴

¹⁹ *Minister of Safety and Security & 5 others v Kennedy & another* (SA 69-2020) [2023] NASC (18 July 2023)

²⁰ *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445 para 45.

²¹ *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC).

²² *De Klerk v Penderis and Others* (SA 76 of 2020) 2023 NASC 1 (1 March 2023).

²³ *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (SA 10/2006) [2010] NASC 14 (05 November 2010).

²⁴ *Lewis v Draghoender* (HC-MD-LAB-APP-AAA-2021/00042) [2022] NAHCMD 41 (22 July 2022) para 17.

‘An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules.... In seeking condonation, the applicants have to make out their case on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.’ (Emphasis supplied).

[46] The second leg for condonation as pronounced in *Metropolitan Namibia v Amos Nangolo*,²⁵ held that not only shall an applicant provide a reasonable and acceptable explanation for their non-compliance, it must also be shown that the main matter has prospects of success in fact and in terms of the applicable law, and that each case will be determined on its merits,²⁶ while the court enjoys a very wide discretion.²⁷

[47] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,²⁸ it was held that in determining an application of this nature, a consideration of what is just and equitable was necessary, and regard should be had to the following factors:

- (a) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (b) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

²⁵ *Metropolitan Namibia v Amos Nangolo* (CA 03/2015) [2017] NAHCNLD 2 (30 January 2017).

²⁶ *Prosecutor-General v Paulo* (2) [2020] NASC 19 (24 June 2020) para 22.

²⁷ *Lewis v Draghoender* (HC-MD-LAB-APP-AAA-2021/00042) [2022] NAHCMD 41 (22 July 2022) para 18.

²⁸ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545D-G; *Hardap Regional Council v Sankwasa and Another* (LC 15/2009) [2009] NALC 4 (28 May 2009) para 9.

(c) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party;

(d) where there is the potentiality of irreparable harm or prejudice to both the appellant and respondent, the balance of hardship or convenience, as the case may be.

[48] Mr Hamunyela asserts that the Town Council enjoys prospects of success as the arbitrator erred in granting the award, which award exceeds N\$1 million, and that on the strength of the damages awarded to Mr /Uirab, the balance of convenience favours the Town Council, as the Town Council may be left in a position that it may not be able to recover the award if successful on appeal, and further that in the meantime, payment of the excessive award may result in service interruptions for the town of Rehoboth.

[49] In turn, much of the opposition by counsel on behalf of Mr /Uirab, is levelled against the condonation application and the *bona fides* thereof. I say so, keeping in my mind both on the heads of argument and in oral argument, counsel on behalf of Mr /Uirab, save for denying the Town Council has any prospects of success, does not address the denial, despite the clear assertion by the Town Council that the award stands to be set aside on appeal with reference to the damages order alone. As a matter of fact, when questioned during argument on the quantum of the award, counsel for Mr /Uirab conceded that the correctness thereof was not something he had occasion to consider and could not take the matter any further.

[50] Ueitele J in *Ongwediva Medipark (Pty) Ltd v lithete*²⁹ writes:

'It would seem to me that although the non-compliance by the defendant is

²⁹ *Ongwediva Medipark (Pty) Ltd v lithete* (HC-MD-CIV-ACT-CON-2022/02350) [2023] NAHCMD 432 (25 July 2023) para 23.

serious, I keep in mind what Strydom CJ has said in the *Leweis v Sampoio*³⁰ matter. I am of the view that an application for condonation must also not be regarded as an inquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for condonation is not bona fide.’

[51] The Supreme Court in *Standard Bank Namibia Limited v Nekwaya*³¹, found:

‘This court has held that there is some interplay between the obligation of a litigant to provide a reasonable and acceptable explanation for the non-compliance with a rule of court, and the reasonable prospects of success on appeal. Thus, good prospects of success may lead to a condonation and reinstatement application being granted, in spite of the fact that the explanation for the non-compliance is weak or not entirely satisfactory, as it is in this instance.’

[52] I accept that the application for condonation by the Town Council is rather lacking in its disclosure to court as to the delay in bringing the application. I also do not understand why legal practitioners accept briefs which they are unable to execute timeously. This conduct has been deprecated in numerous judgments of this court. The line, on the particulars facts of this case, is very thin. However, I must say that I do not believe that the application is not *bona fide*. The Town Council has arguably demonstrated that on the issue of the quantum of the award, it may enjoy prospects of success on appeal, and that although delayed, gives rise to probable defence against the award.

[53] In my mind, it further follows, on the arguments by counsel for the parties, where the Town Council is in the business of providing municipal services to the residents of the town of Rehoboth, the potentiality of irreparable harm or

³⁰ *Leweis v Sampoio* 2000 NR 186 (SC).

³¹ *Standard Bank Namibia Limited v Nekwaya* (SA 95-2020) [2022] NASC (1 December 2022) para 40.

prejudice being sustained by the appellant on appeal if leave to execute were to be granted, favours the Town Council, as the award is in excess of N\$1 million of rate payers money, which money the Town Council is responsible for.

[54] I do not for a second assume this will in all instances be the case, but on the consideration of the facts, and having regard to the papers put up by Mr /Uirab, Mr /Uirab makes bare allegations that his vehicle was sold in execution and that his life came to a virtual standstill.³² What is meant with virtual standstill and the specificity thereof is not placed before court.

[55] The parties make no issue of costs, and I do not consider that either party acted vexatiously during these proceedings. As a result, I find no reason why an award of costs extraordinary to the labour arena should be made.

[56] In light of the foregoing, the application for a stay of the arbitration award cannot be entertained either. Therefore, I make the following order:

1. The applicant's application for condonation is granted.
2. The execution of the arbitration award dated 15 September 2022 under case number CRWK 215-19 is suspended pending appeal.
3. There shall be no order as to costs.
4. The matter is regarded as finalised and removed from the roll.

E M SCHIMMING-CHASE
Judge

³² Para 35 of Mr /Uirab's answering affidavit.

APPEARANCES

APPLICANT: H Hamunyela
Of Andreas-Hamunyela Legal Practitioners,
Windhoek

FIRST RESPONDENT: R Silungwe
Of Silungwe Legal Practitioners,
Windhoek