REPORTABLE

CASE NO: SA 62/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TELECOM NAMIBIA LIMITED **Appellant**

and

MICHAEL NANGOLO AND 33 OTHERS **First – Thirty Fourth Respondents**

PHILIP MWANDINGI N.O. **Thirty Fifth Respondent**

Coram:	MAINGA JA, MTAMBANENGWE AJA *and* HOFF AJA
Heard:	**23 June 2014**
Delivered:	**25 November 2014**

APPEAL JUDGMENT

MTAMBANENGWE AJA (MAINGA JA and HOFF AJA concurring):

[1] The subject of this appeal is the whole judgment of Damaseb JP delivered in the High Court on 28 May 2012.

[2] On 13 May 2009 appellant noted an appeal to the Labour Court against an arbitration award made against it by an arbitrator on 13 March 2009, in terms of which appellant was ordered to pay the amount of N$674 760,00, to thirty (30) of its former employees in respect of their claim for accrued leave entitlement and severance allowance which were the subject of their claim in the hearing before the arbitrator.

[3] On 23 October 2012 appellant filed a notice of application for condonation of the late filing of appellant's notice of appeal to the Labour Court. Damaseb JP dismissed that application. In his judgement, Damaseb JP dealt with the delay to file the notice of appeal, the explanation for the delay, and appellant's prospects of success on appeal against the arbitrator's award. The learned judge made negative findings in regard to the explanation for the delay, as well as in regard to appellant's prospects of success. Appellant's grounds of appeal in this matter encompass a number of errors allegedly committed by the court *a quo*, particularly in its negative finding as to the adequacy and reasonableness of the explanation for the delay and the prospects of success.

[4] Before turning to consider the court *a quo's* judgment let me briefly refer to the time limits prescribed by the Labour Act as to appeals. Section 90(2) of the Labour Act 11 of 2007 provides:

> '(2) A party to a dispute who wishes to appeal against an arbitrator's award . . . must note an appeal in accordance with the Rules of the High Court within 30 days after the award being served on the party'.

Rule 17 of the Labour Court rules prescribes the same period within which an appeal or review should be noted.

[5] The founding affidavit of the condonation application was deposed to by a Ms Yvette Zoë Aspara, the assistant legal advisor of appellant. In it she states that the arbitration hearing was held on 16 February 2009, the award was made on 13 March 2009. On 7 April 2009, Ms Dolly Loide Nashandi, appellant's senior manager for Human Resources and Support, received a call from the Labour Commissioner's office asking her to attend that office and collect the award and she sent a fellow employee who collected the award on the same date. She says that what happened on 7 April was improper service in terms of the rules, and also complains that the award does not include the peremptory notice informing parties of their right of appeal or review.

[6] The court *a quo* found the above narration of how the award came to the attention of appellant as substantial compliance in regard to service. In view of the fact that appellant has a fully established legal department manned by some lawyers including Ms Aspara herself, the non-mention in the award of the right to appeal or review in my view is of no consequence. The provision was obviously made for the benefit of non-legally represented litigants. Ms Nashandi together with Reverend Jacobus Adolf Gertze, senior manager for Employee Relations represented appellant at the arbitration hearing.

[7] According to Ms Aspara, Ms Nashandi, after receiving the award waited for Reverend Gertze, her supervisor, who was then on leave and only returned on 14 April 2008. On his return, Gertze was given a copy of the award and he in turn handed it to the acting general manager for Human Resources, one Mr Mushariwa whom he advised to bring it to the attention of appellant's legal department. Both Gertze and Aspara confirmed that Mushariwa was fully briefed and it was indicated that the award could be appealed against or taken on review. After Mushariwa briefed the managing director of appellant on the same day (14 April 2009), he asked his secretary to pass the award to the secretary of the legal department. That secretary in her confirmation affidavit says she could not remember receiving the award or passing it on to a responsible person in the legal department. Aspara was then acting head of the legal department. The award never reached her as intended until 7 May 2009, which is a month after it was collected from the Labour Commissioner's office.

[8] The court *a quo* found that Aspara did not say from whom she received the award nor did she explain if senior officials of appellant, especially the Managing Director, Gertze or Mushariwa made any enquiries as to whether the matter was being attended to. This is surprising in view of the fact that the deadline for payment as directed by the arbitrator, 30 April 2009, was approaching.

What the court *a quo* found was not explained

[9] In the founding affidavit Aspara states that on 7 May 2009, the respondents (former employees of Telecom Namibia, beneficiaries of the arbitration award)

demanded payment in terms of the award. It was only on that date, according to her, that she then briefed appellant's legal practitioners of record to attend to the matter. The court *a quo* found that Aspara:

> '. . . does not tell the court what exactly was the instruction given, a circumstance that is significant in view of the deadline that was imposed in the award. What she does tell us is that a certain Mr Hough who in a confirmatory affidavit states that he is the office administrator for the legal practitioners of record, received the instruction'.

The court goes on to say:

> '(16) What Hough does not tell the court is significant: It appears from his affidavit that he is not an admitted legal practitioner. He fails to tell us why the matter was not handed to an admitted legal practitioner in the firm. It is implied to what is said about his handling of the matter that he took the decision to brief counsel practising without a fidelity fund certificate. It appears therefore that no-one in the firm brought their professional mind to bear on the matter. Had they done so, they would have noticed that the matter was the subject of a deadline.
>
> (17) Neither Aspara nor Hough tells the court what further inquiries were received in the meantime from the applicant by the legal practitioner of record in view of the deadline that was imposed in the award and considering that, on Aspara's own admission, the respondents had already demanded payment in terms thereof'.

The court continued:

> 'What the court was told however is that Hough allegedly did not secure "available counsel". Just whom he tried to contact we, are not told. It was only on 12 May that Hough allegedly secured counsel. It is implied that Hough, an office administrator,

briefed instructed counsel in the matter. We are not told whether anyone from the applicant was present at the briefing and what role of any an admitted legal practitioner in the firm played in the briefing of counsel. The entire handling of this matter by applicant's legal practitioner of record raises serious issues of professional ethics'.

[10] I pause briefly to say that in my opinion all that happened up to 7 May and thereafter up to and including Hough's actions needed a fuller explanation than what Aspara purported to do in para 18 of her affidavit. All she did therein was to put hearsay evidence before the court, the explanation was not forthcoming at all.

'[18] Aspara then makes the following critical allegation:

"I confirm that May 7 was the first time any employee in the applicant's legal department became aware of the arbitration award. The appellant's general manager for Human Resources, along with all the other managers who had knowledge of the award, was under the impression that the legal department would take the steps required to prosecute the necessary appeal or review of the award as this department is responsible for ensuring that all relevant steps are timeously taken"'.

[11] The learned Judge's comments on this appear in paras 19 to 21 of the judgment *a quo*. I quote the same in full to indicate my full agreement therewith:

'[19] It can be inferred from the above allegation that it was general knowledge amongst officials of the applicant that the legal department was the one responsible for protecting the legal interests of the applicant in matters such as the present. That reality stands in sharp contradiction with the conduct of all the officials who handled the matter after the award was received on 7 April 2009. It clearly shows a measure of

disrespect for the legal process envisaged under the Labour Act. One sadly and regrettably gets the impression that applicant's officials took the attitude that since they did not agree with the arbitrator's award they would simply ignore the consequences that were attendant on it and instead have recourse to the court when it suited their convenience. That bodes ill for the rule of law and the intent of the legislature that intended labour disputes to be handled in a way that promoted speed and, as far as possible without recourse to court. There is not even any attempt at an explanation why Gertze or the person before him, or Mushariwa or indeed the managing director did not immediately engage the responsible person in the legal department or indeed their chosen legal practitioner to attend to the matter without fail.

[20] Mushariwa's action is even more troubling and speaks to the attitude I referred to earlier. He handed the award to his secretary and asked her to pass it on to another secretary in the legal department. Why did he not deal directly with the responsible person in the legal department? More so, as head of Human Resources, ought he not to have known that the head of legal department was, as stated by Aspara, out of the country at the time Gertze passed on the award to him?

[21] The action by the legal practitioners of record in delaying what was otherwise an urgent and serious matter is just as, if not even more, troubling and probably is attributable to the fact that the instruction was sadly attended to by a person not subject to the discipline of the legal profession. The legal practitioners of record after receiving the instruction and without, it seems, any request by the applicant's officials to act urgently in the matter, took another 7 days to act on it, certainly on the unreasonable basis, that they could not find instructed counsel, they said counsel was not identified'.

One can only add the following to what the court *a quo* said in para 19 of its judgment:

'The said officials treated the matter as one of no importance at all'.

<u>The delay in this matter</u>

[12] It is common cause that in terms of s 89(2) of the Labour Act, the award ought to have been appealed on 6 May 2009 following the receipt of the award on 7 April 2009. The notice of appeal was, however, filed on 13 May 2009. The court *a quo* dealt with three aspects of the delay involved in this matter, namely:

> ‘(a) The delay in the contemporaneous conduct of applicants senior officials;
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> (b) The delay in the noting of the appeal; and
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> (c) The delay in bringing the condonation application’.

The court said of these aspects of delay:

> ‘[23] Neither in the contemporaneous conduct of the applicant’s senior officials, nor the explanation now offered in support of the application for condonation now before me, do I find any acceptable (in the sense of being satisfactory) or reasonable explanation for the failure to timeously prosecute the appeal against the arbitrator’s award. There is equally no explanation at all, neither by the applicant or its legal practitioner, why the application for condonation was only brought as late as 25 June when the notice to appeal was already filed on 13 May 2009. The law as I have shown is settled that the application for condonation must be brought as soon as the delay has become apparent and to the extent it was not so brought, there must be an acceptable, full and accurate explanation for the delay in the bringing of the application for condondation. The application is singularly and demonstrably lacking in that regard too.
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> [24] Even if I were to accept that the award was not served on the applicant in terms of the rules of court, I am satisfied that it did not suffer any prejudice as they, by their own admission, received the award’.

[13] Paragraph 12 of appellant's heads of argument states in part:

> 'In this appeal against the refusal by the court a quo to grant condonation for the late filing by four days (13 May 2009 instead of 7 May 2009) of the appellants notice of appeal against an award in favour of (at least some) of the respondent's, we submit the principle *(sic)* issue on the substance of the appeal ie whether the court a quo failed to exercise its discretion judicially. In particular, did the court a quo materially misdirect itself or act upon a wrong principle in:
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> 12.1 its consideration of the prospects of the appellant succeeding in having the arbitration award set aside; and
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> 12.2 its assessment of:
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> 12.2.1 the explanation for the four court day delay in filing the notice; and
> 12.2.2 the impact of the absence of a clear explanation on the papers for the filing of an application for condonation for the delay only on 25 June 2009'. (My underlining).

[14] The underlining in the passage I have just quoted is meant to indicate two misreadings or misinterpretations of the court *a quo*'s findings including that:

(a) the court, as I stated above, dealt with three aspects of the delay involved, not just the delay to note the appeal; and

(b) the court did not find that there was 'absence of a clear explanation on the papers for the filing of an application for condonation for the delay only on 25 June 2009'; it found that there was no explanation at all.

As regard the delay ‘by four days’ it will be noted that the emphasis on the so-called ‘four days’ delay is made even in the founding affidavit by Aspara, in the condonation application, and in the founding affidavit application by Gertze in the application to stay the execution of the award. However, I agree with the court *a quo* in its consideration of the delay in this matter as extending beyond the delay to file the condonation application. The delay in the conduct of appellant’s senior officials and legal representatives and the delay in the initiation of the condonation application are also relevant factors.

[15] Appellant’s counsel obviously knows and does appreciate that the conduct of appellant’s officials and that of its legal practitioners is a relevant consideration in condonation applications. Hence, the submission in para 9 of his heads of argument:

> ‘We respectfully submit that this is not the type of exceptional case where there was a flagrant or gross disregard or ignorance of the rules concerning appeals by legal representatives, which would entitle this Honourable Court to refuse condonation even where the appellant was in no way at fault and irrespective of the prospects of success on the merits of the appeal’.

That the conduct of the officials of appellant was the foundation of all that ensued thereafter and on which the court *a quo* made negative findings in this matter is beyond any doubt.

[16] As to what appellant’s counsel described as the principal issue, the court *a quo* demonstrated its understanding of the rules when it started by quoting, in para 14 of its judgment, what was said by the Full Bench of the High Court in *Swanepoel v*

Marais and Others 1992 NR 1 at 9J – 3A and then went on in para 5 to list the principles that 'can be distilled from the judgment of the Courts as regards applications for condonation'.

[17] One of the principles the court *a quo* listed relates to what the courts refer to as 'the prospects' not 'the prospect' of success on appeal. There are a number of decided cases both in this jurisdiction and in South Africa that demonstrate that the prospects of success on appeal, though an important consideration, standing alone is not a decisive consideration. There are also a number of cases that show that despite the prospects of success being good, an application for condonation may or should not be granted if there was a flagrant violation or non-observance of the rules. In this case I follow what Holmes JA said in *Malane v Santam Insurance Co Ltd* 1962 (4) SA 532 (A) at 532F:

> 'I think all the foregoing clearly emerge from the decisions of this Court, and therefore I need not add to the ever-growing burden of annotations by citing the cases'.

The grounds of appeal

[18] The grounds of appeal against the court *a quo's* dismissal of the condonation application are enumerated in an application made by appellant in an application for leave to appeal which was also served before Damaseb JP. These grounds mostly hinge on the allegation that 'the learned judge erred on the law/or the facts and/or did not exercise his discretion in a judicial manner . . .' The rest of the grounds are in my view an omnibus or conglomerate of objections relating to the prospects of success

including points that should have been but were not raised by appellant's representative at the arbitration hearing, such as the number and identity of the respondents and how the complaints of the respondents were presented. Finally, in para 14 of this heterogeneous narration of complaints it is alleged:

> '14. He misdirected himself in the exercise of his discretion by failing to apply the balancing exercise established by the authorities on the issue, to the explanations for the delays and the merits of the appeal'.

There is no substance whatsoever in this ground because the judge *a quo*, soon after listing the principles applicable to applications for condonation, considered appellant's prospects of success on appeal. Because I find that his findings on the question of the explanation for the delays that occurred in this matter cannot be faulted, I need not express any views on appellant's prospects of success. Those cases where the courts considered the prospects of success involved a demonstration of the strength or weakness or absence of prospects of success.

[19] Only para 13, 14 and 15 of appellant's written heads of argument refer to the alleged misdirection by the court *a quo*. There (in these paragraphs) the following issues are raised:

(a) the question of the identity and number of the respondents where counsel says the court *a quo* found the precise identity of 30 aside from Michael Nangolo does not appear from the record;

(b) the content of the form referring the dispute to conciliation or arbitration (Form LC 21), which counsel says was served on the appellant referring only to Michael Nangolo; and

(c) that the complaint to the Labour Commissioner was neither a properly filed joint nor class complaint as required by the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner.

Counsel caps the submission as follows:

> '15. These common cause facts pose two problems. First, there is uncertainty on the beneficiaries of the award, and secondly, persons who were not claimants would or may be beneficiaries of the award'.

[20] Notwithstanding my opinion that I do not need to consider the appellant's prospects of success, I think it is pertinent to point out that the evidence shows that both at the conciliation and at the arbitration hearing there was in attendance more complainants than could be accommodated in the room(s) where the proceedings took place. Secondly, if the allegations in these paragraphs are correct and common cause, then they should have been raised as points *in limine* before the arbitrator and not *post facto* as appellant purports to do in these submissions. The questions looms large as to why this was not done and why there is no explanation of why it was not done. When one considers the factor of 'prospects of success' in a condonation

application, the importance of the matter is one of the considerations to be put on the balancing scales. In this matter the attitude of appellant, judged by the conduct of its representatives both at the arbitration hearing (including a legal practitioner, Ms Nashandi) and those who handled the award when it was brought to their attention amply supports the court *a quo's* strictures directed at them in its judgment. The record pertaining to the arbitration hearing shows that the arbitrator specifically asked the parties if there were any irregularities; none were noted and there is no allegation that he did not ask that question. The clear inference to be drawn from the silence in this regard on appellant's representatives' part and other relevant circumstances, is that they waived the right to take issue on that score.

[21] In the written submissions on behalf of the appellant, Mr Heathcote raises a number of arguments seeking to minimize the omissions pointed out by the court *a quo*, or to show that the court *a quo* might have been mistaken on some points, for example in regard to the instructions given to Mr Hough by Ms Aspara. I accept, in particular, that as regards the instructions to Mr Hough the court *a quo* overlooked Ms Aspara's instruction that was attached to her affidavit. However, I do not accept that these arguments or oversights are such as to detract from the balancing exercise that the court *a quo* obviously carried out in considering the condonation application. With respect, the balancing exercise the court is required to do in such cases does not require or involve an equation of factors under consideration, but is a question of deciding what weight to attach to each factor. In my opinion the contravening factors

taken into account by the court *a quo* in deciding whether to grant condonation in this case overwhelmingly militate against granting condonation.

[22] For these reasons I make the following order:

1. The appeal is dismissed.

2. Appellant is to pay the costs of this appeal, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.

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MTAMBANENGWE AJA

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MAINGA JA

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HOFF AJA

APPEARANCES

APPELLANT:	R Heathcote (with him R Maasdorp) Instructed by Köpplinger Boltman Legal Practitioners
FIRST TO THIRTY FOURTH RESPONDENTS:	J A N Strydom Instructed by Titus Ipumbu Legal Practitioners