



NOT REPORTABLE

CASE NO: SA 41/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between

NAMIBIA POWER CORPORATION (PTY) LTD

Appellant

and

MICHAEL KAAPEHI

First Respondent

JOSEPHINE DE OLIVEIRA

Second Respondent

PHILIP MWANDINGI

Third Respondent

CORAM: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 20 October 2020

Delivered: 29 October 2020

Summary: The appellant is the country's electricity bulk supplier. The first and second respondents were its employees. The first and second respondents requested the appellant to be included in the category of employees entitled to receive a 'scarcity allowance'. The scarcity allowance was alleged to have meant to help the appellant retain its employees with technical and scarce skills at Ruacana. The first and second respondents' requests were declined. They subsequently filed a dispute of unfair discrimination against the appellant at the Labour Commissioner. The third respondent, an arbitrator in the Office of the

Labour Commissioner, found in favour of the first and second respondents and ordered that the respondents be paid a scarcity allowance. The appellant appealed to the Labour Court against the arbitrator's award. The appeal lapsed due non-prosecution. The appellant brought an application to have the appeal reinstated. However, the application was struck from the roll on the date of the intended hearing due to the absence of the appellant's legal practitioner in court. After several unsuccessful efforts to place the matter on the roll, the appellant eventually succeeded to do so. The Labour Court dismissed the application, reasoning that the delay to prosecute the appeal was unreasonable and the explanation for the delay unacceptable. An application for leave to appeal to the Supreme Court was also dismissed. The appellant successfully petitioned the Supreme Court for leave to appeal.

On appeal to the Supreme Court, *held* that although the explanation for the delay to prosecute the appeal was not entirely satisfactory, the prospects of the appeal succeeding were good. Hence, the Labour Court should have granted condonation for the late prosecution of the appeal and should have reinstated the appeal. *Held* further that the appeal succeeded and matter referred back to the Labour Court to decide the appeal against the arbitrator's award.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

Introduction

[1] In this appeal matter, the Labour Court dismissed the appellant's application for condonation and reinstatement of its appeal against the arbitrator's award and refused its application for leave to appeal to the Supreme Court. The appeal is before us with leave of this court.

[2] The first and second respondents were employees of the appellant and were both stationed at Ruacana, northern Namibia. The third respondent is an arbitrator with the Labour Commissioner and was cited in his official capacity by virtue of his having presided over the arbitration proceedings in which he rendered the arbitration award; the subject matter of appeal by the appellant to the Labour Court. The third respondent has not taken part in the proceedings in the Labour Court or in this court.

Background

[3] The following background information was apparent from the record of appeal before us. The appellant is the country's national bulk electricity supplier. As such, it must employ highly technical and skilled employees at its various stations throughout the country, including outlying towns such as Karasburg, Rosh Pinah and Ruacana. Since before the country's Independence in 1990, the appellant experienced difficulties in attracting employees with certain critical and technical skills to these remote towns. In respect of Ruacana, this was due to a number of factors, including the geographical location, the lack of adequate health services in a malaria prone area as well as the lack of adequate school facilities in the town.

[4] The scarce skills that the appellant required were invariably not available on the open labour market. Instead, they were acquired through in-house training by the appellant. Naturally, the appellant would want to retain its employees once it had imparted those scarce skills onto them. The appellant could, however, not always retain the skilled employees as they were prone to leaving after a few

years of service to work in towns or areas with better health and educational amenities. To counter this deleterious effect on its operations, the appellant's Executive Committee, in 2003, decided to pay a 'scarcity allowance' to certain of its employees with technical and scarce skills stationed in remote areas, including Ruacana. The decision to introduce the scarcity allowance was embodied in the minutes of the meeting of the Executive Committee and no policy document existed for this purpose.

[5] Prior to the introduction of the scarcity allowance incentive, employees with critical and scarce skills were given a 'danger pay' to retain their services in Ruacana. That was before Independence and during the period in the country's history when there was intensified guerrilla warfare in that part of the country. Such employees were paid 25% of the total guaranteed package per month of their salaries. This figure was retained when the incentive appears essentially to have been renamed 'scarcity allowance' in 2003. The appellant's employee structure is based on grades. However, the scarcity allowance was not based on grades. On the contrary, it related to specific positions the qualifying employees occupied due to the inherent requirements of their jobs.

[6] Those employees who qualified for the scarcity allowance fell into only 8 specific categories, namely power station managers, engineers, engineering technicians, shift supervisors, operating superintendents, maintenance superintendents, electricians, and fitters and turners. These categories had been identified as constituting technical and scarce skills required for the appellant's smooth operations. Nobody else had been added to the list, despite requests from

certain employees, such as chefs stationed at the appellant's lodge at Ruacana, to be added to the list. During 2016, there were only about 25 employees at Ruacana who qualified to receive the allowance based on their technical and critical skills. Most importantly, all employees who received the allowance had signed contracts of employment in which such allowance was specifically stipulated, which accordingly vested the entitlement to such allowance. The first and second respondents had not signed such contracts. The first respondent was employed as a Safety, Health and Environmental (SHE) Officer in 2003 while the second respondent was recruited to serve as a nurse in 2006. The second respondent was originally from Ruacana and was previously employed as a nurse at a public clinic in that town. The respondents requested the appellant to be included in the category of employees entitled to receive a scarcity allowance. The first respondent motivated his request when asked to do so in cross-examination by stating that his services were 'critical to the organisation that [they] might also be seen as scarce skills to qualify for this benefit'. The second respondent contended in evidence that Ruacana was a remote area and that as the only nurse at the appellant's clinic, she often struggled to find a temporary nurse to stand in for her whenever she wanted to take leave of absence. For those reasons, she 'felt' that she too qualified to be paid a scarcity allowance.

[7] After their requests to be included in the category of employees who receive the allowance had been declined, the respondents filed a complaint of 'unfair labour practice and unfair discrimination' against the appellant with the Labour Commissioner. It nevertheless became apparent during the hearing that the dispute was essentially one of unfair discrimination as the contention of unfair

labour practice, in the words of the arbitrator, had 'become academic'. After hearing evidence, the arbitrator set out his findings and reasons in a wide-ranging arbitration award. In essence, he found that the respondents' exclusion from receiving a scarcity allowance amounted to unfair discrimination. This he did by relying on the views expressed in Wikipedia of what types of discrimination were perceived to be illegal or unfair and by applying the provisions of s 5 of the Labour Act 11 of 2007 to the facts of the complaint.

[8] It would appear that the arbitrator found against the appellant principally for the reason that the appellant's representative in the hearing failed to produce in evidence the policy document embodying the scarcity allowance. This despite the evidence that the resolution of the appellant's Executive Committee was recorded instead in the minutes of its meeting, whereat the decision to introduce the allowance was taken. The arbitrator in the end ordered, amongst other things, that the appellant place the respondents on the list of employees entitled to receive the allowance. The appellant appealed to the Labour Court and it is in that court that the matter took a tortuous path to reach this court. More about that below.

The appeal lapsed

[9] The appellant's appeal against the arbitrator's award was noted timeously on 26 October 2017. It was opposed by the first and second respondents. The appeal, however, lapsed for want of prosecution. Rule 17(25) of the Labour Court Rules provides that an appellant had to prosecute the appeal within 90 days from the date of the noting of the appeal. In terms of rule 23(4) of the rules relating to the Conduct of Conciliation and Arbitration, the Labour Commissioner must

transmit the record of the hearing of the complaint, together with the original arbitrator's award, to the registrar of the High Court within 21 days from the date of the noting of the appeal. The affidavit deposed to by the appellant's legal practitioner who had the conduct of the appeal, sets out the reasons for the lapsing of the appeal and the steps – and I may add missteps - taken to have the appeal reinstated. It is to this aspect that the judgment turns next.

[10] The legal practitioner explained that despite the arbitrator having been served with the notice of appeal on 7 November 2017, the record of the arbitration proceedings could not be filed within 21 days as required by the relevant rule. This was due to a number of factors. First, an inaudible recording was inadvertently sent to the transcribers. The transcribers returned the record accompanied by a certificate stating that as the recordings were inaudible, the record could not be transcribed. Second, the arbitrator had taken leave of absence and returned to work only on 22 January 2018 and it would appear the Labour Commissioner could not produce the record in the absence of the arbitrator. This appears to be the position if regard is had to the response by the Labour Commissioner when put on terms to transmit the record as it will shortly become apparent. The record was eventually uploaded on the e-justice system on 31 January 2018.

[11] While waiting for the Labour Commissioner to provide the record, the legal practitioner for the appellant enquired from the former about the progress made, if any, in the filing of the record of the arbitration proceedings. On 6 and 12 December 2017, she telephonically contacted the Office of the Labour Commissioner but her calls went unanswered. Her office closed for the customary

holidays on 15 December 2017 and reopened on 10 January 2018. On 15 January she again telephoned the Offices of the Labour Commissioner, which calls again went unanswered.

[12] On 16 January 2018, she attended to the Offices of the Labour Commissioner and it was then that she was informed that a wrong recording had been sent for transcription and that it had been returned as inaudible. On the same day, she addressed a letter to the Labour Commissioner in which she requested the record in writing. The following day the Office of the Labour Commissioner responded to her letter, informing her that the arbitrator was on leave; that he would resume duties on 22 January 2018, and that the Labour Commissioner would revert once he had 'obtained clarity' from the arbitrator. On 19 January 2018, the legal practitioner wrote to the first and second respondents' legal practitioners informing them that the appellant would bring an extension and condonation applications in light of the delays by the Labour Commissioner to dispatch the record of arbitration proceedings.

Attempts to reinstate the appeal

[13] With the time to prosecute the appeal having lapsed on 24 January 2018, the appellant's legal practitioner on 12 February 2018 and on advice from an e-justice expert in Singapore, set the applications for condonation, extension and reinstatement down on e-justice via 'ancillary process' channel. However, as this was an incorrect channel, the matter could not be set down on the system. After this attempt failed, the legal practitioner on 15 February 2018 successfully brought a fresh application for condonation, extension and reinstatement under a different

case number and subsequently set the matter down for hearing on 9 March 2018. She explained that during the week ending 9 March 2018, she had a trial set to begin on 5 March 2018 before a different judge.

[14] In light of this development, she briefed a colleague of hers to attend to the hearing on 9 March 2018. The colleague accepted the instructions, but pointed out that she had an interlocutory hearing scheduled for the same day at 09h00 before a different judge and that if her matter was not heard before 10h00, she would endeavour to stand it down so that she could attend to her colleague's matter. At around 09h50 on 9 March 2018, the appellant's legal practitioner was informed by her colleague that the matter that was due to start at 09h00 had not been called and that in all likelihood it would be called only around 10h00, the same time that the present matter was due to be called.

[15] She accordingly informed the appellant's legal practitioner that she would not be able to stand in for her. Faced with this predicament, the appellant's legal practitioner telephoned 'a few law firms' to ascertain the availability of a legal practitioner who could stand in for her. The efforts to find a replacement were all for naught. She then rushed to the courtroom where the matter was to be heard only to be greeted with the reality that the unopposed matter had already been struck from the roll due to the non-appearance of the appellant's legal practitioner.

Further attempts to re-enrol the matter

[16] On 20 March 2018, the appellant's legal practitioner brought a new application, but under a civil a case number to be scheduled to the roll under civil

motions. The legal practitioner realised the futility of attempting to re-enrol a matter that had been struck from the roll, so she on 29 March 2018, resorted to another procedure of filing it under a labour case number on ‘ancillary process,’ (formerly interlocutory process) on the High Court’s e-justice remote filing process. But even then she soon discovered that the matter could not be scheduled to the roll through this channel either. After conducting ‘further investigations on how to go about bringing a proper reinstatement application,’ on 14 May 2018 the legal practitioner brought a fresh application. This application was opposed by the first and second respondents. The parties exchanged affidavits and subsequently met at the registrar’s offices on 4 July 2018 to obtain hearing dates, but despite the invitation to meet at the registrar’s office having been made in accordance with the Labour Court Rules, the case did not appear on the roll and therefore no date could be allocated to the matter.

[17] The legal practitioner explained that after this further setback, she undertook an investigation to find out why the e-justice system was rejecting her applications and so she ‘engaged different legal practitioners on this matter’ and only then did it dawn on her that the matter could not be accepted on the labour reinstatement roll, because as a labour court matter, it should not have been registered under a civil case number, something that the legal practitioner said was done inadvertently. She accordingly followed the correct procedure and brought the application that is the subject matter of the present appeal. The legal practitioner attributed the missteps she took in an attempt to have the application heard to her inexperience in labour matter and the intricacies of the e-justice system. She insisted though that it was the appellant’s intention throughout the

process to have the appeal reinstated. According to her, such an intention is evinced by the numerous but unsuccessful attempts to reinstate the appeal. She also mentioned that the appellant had good prospects of success on appeal and referred to the grounds of appeal that, in the main, contend that the arbitrator erred in finding that the exclusion of the first and second respondents from receiving a scarcity allowance amounted to unfair discrimination.

The Labour Court's approach

[18] The Labour Court dismissed the application, reasoning that there was an unreasonable delay in prosecuting the appeal and that the explanation why the application could not set down for hearing was unsatisfactory. Whilst the court was sympathetic to the plight of the appellant's legal practitioner who had conducted the matter, the explanation of inexperience on her part was found unacceptable as she came from a 'well-established and well-respected law firm with a number of senior colleagues' who could have assisted her. On the prospects of success on appeal, the Labour Court reasoned that in light of the finding by the arbitrator that the appellant had failed to produce in evidence the scarcity allowance policy document, the prospects of success was 'not likely to be good if critical evidence was not adduced in the arbitration proceedings'. In its judgment on leave to appeal, the Labour Court reasoned, if I understand it correctly, that if the explanation for the delay in the prosecution of the appeal was the only requirement for a condonation application, the court might not have rejected the explanation for the delay given by the appellant's legal practitioner. The court noted, however, that the biggest hurdle to the granting of the application was that the appeal had lapsed and that the Labour Act did not clothe the court with the power to revive a lapsed

matter. The court relied on certain dicta in *Tjiuma v Meatco Namibia*¹, a Labour Court matter, for this proposition.

Analysis

[19] The Labour Court was seized with applications that included an application for condonation and reinstatement. As this court recently noted, for a condonation application to succeed there are two general considerations. In the first place, there must be a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of success on appeal.² 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.³

[20] Applying these trite principles to the facts of the appeal, while some of the attempts made by the appellant's legal practitioner to file the applications on e-justice may be criticised as being somewhat clumsy, certainly not all the failures may be attributed to her lack of experience. The e-justice filing system was a relatively recent innovation at the time that may have had its own teething problems. One such glitch appears to have been the lack of functionality for filing interlocutory applications in labour appeals using the case number allocated to the appeal concerned. To her credit, the much-maligned appellant's legal practitioner constantly endeavoured to resolve the issues and gave a detailed explanation for the entire period of the delay. Moreover, the lack of entirely satisfactory

¹ (LCA 6-2015 [2017] NALCMD 6 (16 February 2017).

² *Sun Square Hotel (Pty) Ltd v Southern Sun Africa* (SA 26-2018) [2019] NASC (9 December 2019) para 13.

³ *Id.*

explanation is ameliorated by the prospects of success that appear to me to be good. On this aspect and speaking tentatively, my *prima facie* view is that on a purely point of law as to the ambit and scope of s 5 of the Labour Act as well as its application to the facts of the case, another court may well come to a conclusion different from the one arrived at by the arbitrator.

[21] We were informed from the Bar that only the notice of appeal and the arbitration award served before the learned judge who presided over the applications in the Labour Court, but that the record of arbitration proceedings had been uploaded on the e-justice system. It was thus possible for the judge to have had sight of the record had its existence on the e-justice been brought to the judge's attention. In my respectful view, the determination of the existence of prospects of success or otherwise could be made even on the basis of the record that served before the Labour Court alone. Indeed, the Labour Court made that determination without the benefit of the record of arbitration proceedings as it has now come to light. As to the question whether a lapsed labour appeal may be reinstated, the Labour Court clearly erred when it held that it could not. There can be no doubt that a lapsed appeal may be revived by a successful application for condonation and reinstatement. The *Tjiuna v Meatco* case is not authority for the proposition that this cannot be done. In para 5 of that judgment, the presiding judge noted that the reason why the appeal in that case could not be reinstated was because, 'no application [had] been made to the court to condone applicant's failure to comply with subrule (17), read with subrule (25), of rule 17 [of the Labour Act]' and not because the Labour Act had not given the court the power to reinstate a lapsed appeal.

Conclusion

[22] In the result, it has been found that although the explanation for the failure to prosecute the appeal was not entirely satisfactory, there appears to be good prospects of success of the appeal on the merits. Moreover, the view that a lapsed labour appeal can never be reinstated is palpably wrong. The Labour Court ought therefore to have granted the applications for condonation, extension and reinstatement of the appeal. In light of this conclusion, it has become unnecessary to decide some of the other thought-provoking points of argument raised by counsel on both sides, such as the argument based on *lex non cogit ad impossibilia* (the law does not compel the performance of impossibilities) for the failure to prosecute the appeal raised on behalf of the appellant and the contention that the appellant should have applied for the enrolment of the appeal additional to the application for condonation and reinstatement advanced on behalf of the respondents. As the appeal against the arbitrator's decision has not been decided by the Labour Court, the matter has to be referred back to that court to decide the appeal.

Order

[23] The following order is accordingly made:

- (a) The appellant's appeal against the Labour Court's dismissal of its applications for extension, condonation and reinstatement is upheld.

- (b) The order of the Labour Court dismissing the applications for extension, condonation and reinstatement is set aside and is substituted for the following order:

‘The applications for extension, condonation and reinstatement are granted.’

- (c) The matter is remitted to the Labour Court for adjudication of the appeal against the arbitrator’s award in accordance with the applicable Rules of the Labour Court before any judge.

- (d) No order as to costs is made.

SHIVUTE CJ

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT:

R Heathcote (with him G Dicks)

Instructed by Shikongo Law Chambers

FIRST and SECOND

RESPONDENTS:

EM Angula (with her R Kandjella)

Of AngulaCo Inc