



**REPORTABLE**

CASE NO.: SA 41/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**BEN DANIEL NAKAMBONDE**

**Appellant**

and

**TRANSNAMIB HOLDINGS LIMITED**

**Respondent**

**Coram:** MAINGA JA, HOFF JA and UEITELE AJA

**Heard:** 13 October 2021

**Delivered:** 16 November 2021

**Summary:** This is a labour matter whereby the appellant appeals against the judgment of the Labour Court setting aside the arbitrator's award.

The appellant was employed by the respondent as a train attendant from 1990 until his dismissal on 16 December 2015. On 10 August 2015, appellant was the train

attendant on duty on train no 9908 from Walvisbay to the crossing point – Usakos station. It is alleged and it was the testimony against appellant that on that trip he collected N\$120 from a certain Dikua on the train but failed to issue a ticket to him in the amount of N\$106 and return change of N\$14 to Dikua. Dikua was also not on the passenger list or train plan. At the crossing point, Usakos, a colleague of appellant, Mr Pieter van Zyl took over train no 9908 to Windhoek. On the train he found Dikua without a ticket. When he confronted him, he reported that he gave appellant N\$120 for the ticket, but he did not issue him with the ticket, neither did he give him his change of N\$14. Mr van Zyl reported the incident of Dikua directly to Mr Gideon Eiseb, the senior controller for passenger services. Ms Irene van Wyk (head of investigations at the respondent) investigated the matter and compiled a report wherein she recommended that the appellant be charged with three offences, namely, theft and fraud, misappropriation of the N\$120, and breach of trust. Appellant was subsequently charged and found guilty of all three offences and because of the seriousness of the offences, it was recommended by the chairperson of the disciplinary enquiry that appellant be dismissed. As a result, the appellant noted an internal appeal against the findings of guilt and the recommendation of the chairperson to dismiss him. After consideration of the record of the misconduct enquiry the chairperson dismissed the appeal on 4 December 2015. Appellant on 8 December 2015 filed a request internally to have the appeal decision reviewed as appellant believed that the conclusion of the chairperson of the appeal hearing was wrong. The Disciplinary Review Committee could not find that the enquiry was substantively and procedurally unfair and dismissed the review request on 14 December 2015. On 16 December 2015, Mr Michael Feldmann (Executive Operation) signed the letter terminating the services of the appellant with the respondent.

Having exhausted his internal remedies, appellant referred a dispute of unfair dismissal to the Office of the Labour Commissioner in terms of sections 82(7) and 86(1) of the Labour Act 11 of 2007 (the Act). He sought an award for reinstatement and payment of loss of income, future loss of income, costs of the arbitration and any further or alternative relief. Several conciliation meetings took place in an attempt to

resolve the dispute amicably, but failed. It was agreed that the matter be resolved through arbitration. Once the arbitration hearing was completed, the arbitrator found the appellant's dismissal to be substantively and procedurally unfair and ordered reinstatement with all benefits including monetary compensation from the date of dismissal.

Aggrieved, the respondent subsequently lodged an appeal before the Labour Court on 14 November 2017 against the whole award by the arbitrator. Contained in the notice to appeal were the order respondent would seek in the Labour Court, the questions of law for the appeal and the grounds of appeal. On 22 November 2017 appellant filed his notice to oppose the appeal. The respondent on 21 May 2018 filed its amplified questions of law and grounds of appeal. Due to non-compliance with the rules of the court, the respondent had to bring an application to have the record reconstructed by the arbitrator which relief was granted on 23 February 2018. After some time, the record of the arbitrator was duly certified and dispatched to the Registrar of the Labour Court on 11 May 2018. On 21 June 2018 the record was filed on E-Justice and a hard copy filed with the appellant's lawyers Mbudje & Brockerhoff Legal Practitioners on 9 July 2018. The appellant or his lawyers failed to file a statement of opposition in terms of rule 17(16)(b) within 21 days. The statement instead of being filed on 12 July 2018 was only filed on 16 August 2018. The Labour Court on 28 February 2019 declined the application for condonation for want of a reasonable explanation, holding that the squabbles between the partners in the running of the practice could not be regarded as good cause for the non-compliance with rule 17(16)(a) and (b). The matter resumed unopposed before the Labour Court and after the hearing upheld the appeal of the respondent. The appellant on 20 March 2019 then sought leave to appeal against the whole judgment and order of the Labour Court, which leave was refused on 1 November 2019.

On 3 December 2019 appellant petitioned the Chief Justice and leave to appeal against the judgment and order of the Labour Court was granted on 19 March 2020. Notice of appeal to prosecute the appeal was only filed on 11 June 2020. The notice

of appeal was filed with the application for condonation for failure to file the notice of appeal on time. The reason for failure to file on time was due to the fact that a State of Emergency was declared and subsequently a nationwide lockdown. It was during the same period appellant parted ways with his lawyer, he allegedly seemed to lack faith in his case. He had to wait until the lockdown was eased, that is 5 May 2020 before he could approach the Legal Aid Directorate (the Directorate) to assign him another lawyer. Mr Siyomunji was appointed for the appellant and he consulted with the appellant on 20 May 2020 and the notice of appeal was then filed on 11 June 2020. The record of proceedings as well as the appellant's heads of argument were also filed late accompanied by applications for condonation.

*Held that* the above account how appellant opposed the appeal in the Labour Court and prosecuted same in this court makes it plain that at every turn the appellant failed to comply with the rules of the court.

*Held that* whilst an appellant should not be prejudiced by his or her attorney's incompetence, there is a degree beyond which a litigant cannot be excused thereby.

*Held that* the Labour Court exercised its discretion correctly to refuse the condonation application.

*Held that* the condonation applications filed in this court are not sufficient to warrant the grant of condonation coupled with the fact that both applications omitted the details of the prospects of success.

*Held that* because such applications fail to meet the threshold principles so aptly articulated in numerous cases of this court, like in *Kleynhans v Chairperson of the Council for the Municipality of Walvisbay & others* 2013 (4) NR 1029 (SC), this court refuses to grant same.

*Held that* on the prospects of success, the misconduct enquiry record reveals that appellant chose to conduct his own defence, testified and called a witness, cross-examined witnesses against him and made closing remarks, filed an internal appeal and review. In addition, the findings of the arbitrator of appellant's dismissal being substantively and procedurally unfair are not supported by the evidence adduced before him. The assertions of a conspiracy against the appellant are unfounded and baseless.

The applications for condonation for the late filing of the notice of appeal, and record are refused.

The appeal is struck from the roll.

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### APPEAL JUDGMENT

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MAINGA JA (HOFF JA and UEITELE AJA concurring):

#### Introduction

[1] The appellant, a former train attendant of the respondent, was charged with misconduct and found guilty after a disciplinary enquiry. The disciplinary committee recommended dismissal. The respondent accepted the recommendation and dismissed the appellant. The appellant noted a dispute before the Labour Commissioner which was arbitrated. The arbitrator found that the dismissal was both substantively and procedurally unfair. The respondent appealed the arbitrator's decision to the Labour Court. The Labour Court upheld the appeal, setting aside the arbitrator's order. Appellant appeals against that judgment.

### History of the case

[2] The appellant (Mr Ben Daniel Nakambonde) was employed by the respondent (Transnamib Holdings Ltd) as a train attendant from 1990 until his dismissal on 16 December 2015. On 10 August 2015, appellant was the train attendant on duty on train no. 9908 from Walvisbay to the crossing point – Usakos station. It is alleged and it was the testimony against appellant that on that trip he collected N\$120 from Ceril Dikuaa on the train but failed to issue a ticket in the amount of N\$106 and return change of N\$14 to Dikuaa. Dikuaa was also not on the passenger list or train plan. At the crossing point, Usakos, a colleague of appellant, Mr Pieter van Zyl took over train no. 9908 to Windhoek. On the train he found Dikuaa without a ticket. When he confronted him, he reported that he gave appellant N\$120 for the ticket, but he did not issue him with the ticket, neither did he give him his change of N\$14. Mr van Zyl reported the incident of Dikuaa directly to Mr Gideon Eiseb, the Senior Controller for passenger services. Ms Irene van Wyk, the Head of Investigations at the respondent and two train inspectors, Ms Christine Kharigus and Natalia Korupanda were sent to the train which they intercepted at Brakwater, Windhoek. They approached Dikuaa who related to them what happened and they took a statement from him. Messrs Timbo and Amunyela who were also on the train with Dikuaa volunteered to give statements as they witnessed what happened. Once Ms van Wyk had obtained all statements, including that of the appellant, who must have only said 'he was only doing his job', compiled a report wherein she recommended three offences, as per the human resource policy and procedures, namely, theft and fraud, misappropriation of the N\$120, and breach of trust. Appellant was subsequently charged - count 1:

theft, count 2: misappropriation, count 3: disobedience (non-compliance with established procedure/standing instruction). Mr Eben Muesee, an employee of the respondent and then acting manager Service Delivery, chaired the misconduct enquiry on 10, 12 and 13 November 2015 in Windhoek and Walvisbay. On 18 November 2015, he found appellant guilty on all three offences and for the reason of the seriousness of the offences he recommended dismissal.

[3] Subsequently, the appellant noted an internal appeal against the findings of guilt and the recommendation of the chairperson to dismiss him. Mr Michael Feldmann (Executive Operation) chaired the appeal hearing. After consideration of the record of the misconduct enquiry he dismissed the appeal on 4 December 2015.

[4] Appellant on 8 December 2015 filed a request internally to have the appeal decision reviewed as appellant believed that the conclusion of the chairperson of the appeal hearing was wrong. The Disciplinary Review Committee was chaired by one Chris N Sono (Rail Operations Specialist). The committee could not find the substantive and procedural unfairness of the misconduct enquiry and that the decision of the appeal chairperson was unassailable and dismissed the review request on 14 December 2015.

[5] On 16 December 2015, Mr Michael Feldmann signed the letter terminating the services of the appellant with the respondent.

### The Arbitration

[6] On 22 March 2016, appellant referred the dispute of unfair dismissal and unfair labour practice to the Office of the Labour Commissioner in terms of ss 82(7) and 86(1) of the Labour Act 11 of 2007 (the Act) for conciliation or arbitration seeking an award for reinstatement and payment of loss of income, future loss of income, costs of the arbitration and any further or alternative relief. Several conciliation meetings took place in an attempt to resolve the dispute amicably, but failed. It was agreed that the matter be resolved through arbitration.

[7] The arbitration case number CRWK 277-16 was heard on 9, 30 May and 16 August 2017 by Mr Phillip Mwandingi (Principal Arbitrator) and on 16 October 2017 he made the award in favour of the appellant. The arbitrator's finding was that the dismissal was substantively and procedurally unfair. Substantively unfair when he said: 'The respondent's reason can only be fair if the critical evidence from those who allegedly saw what happened is accepted. I am afraid to mention that I have many reasons not to believe these witnesses. There are so many things they did, or did not do, said which made me believe that most probably the applicant's version is the most probably acceptable one'. Procedurally unfair because the chairperson of the misconduct inquiry was partial when he travelled with Mr Eiseb (the initiator) in the same vehicle from Windhoek to Walvisbay, stayed at the same place in Walvisbay even went together to Eiseb's cottage. Given the bad blood between Mr Eiseb and appellant, Mr Eiseb and Ms Irene van Wyk should not have been involved in the investigation of this case. The appeal chairperson held the view that appellant had



admitted taking the money when there was no evidence to that effect. It was confusing when the appeal chairperson testified that he did not know how appellant had pleaded to the charges against him at the misconduct enquiry when he should have perused the record to determine appellant's plea and that exercise would have led him to the contradictions in the testimonies of some witnesses, which were critical to the determination of the dispute between the parties. The arbitrator as a result ordered reinstatement with all benefits including monetary compensation from the date of dismissal.

#### The Labour Court Proceedings

[8] The respondent (appellant then) on 14 November 2017 filed a notice to appeal against the whole award by the arbitrator. Contained in the notice to appeal were the orders respondent would seek in the Labour Court, the questions of law for the appeal and the grounds of appeal. Appellant's (respondent then) attention was also drawn to the provisions of the Labour Court Rule 17(16)(a) and (b)<sup>1</sup>. On 22 November 2017 appellant or his erstwhile lawyers Messrs Uanivi Gaes Inc filed appellant's notice to oppose the appeal. It is not clear from the affidavit of Mr Trevor Philip

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<sup>1</sup> Labour Court Rule 17(16)(a) and (b) provides.

(16) Should any person to whom the notice of appeal is delivered wish to oppose the appeal, he or she must –

- (a) within 10 days after receipt by him or her of the notice of appeal or any amendment thereof, deliver notice to the appellant that he or she intends so to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he or she will accept notice and service of all process in the proceedings; and
- (b) within 21 days after receipt by him or her of a copy of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice to oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.

Brockerhoff seeking condonation for the late filing of the appellant's grounds of opposition in terms of rule 17(16)(b) of the Act, when appellant terminated the services of Messrs Uanivi Gaes Inc. He however states that his firm Mbudje & Brockerhoff Legal Practitioners were appointed by the Directorate of Legal Aid for the appellant on 5 April 2018.

[9] The respondent on 21 May 2018 filed its amplified questions of law and grounds of appeal. The lapse of time since the notice of appeal was filed on 14 November 2017 was occasioned by the fact that the arbitrator's record was incomplete. The respondent had to bring an application in the Labour Court to have the record reconstructed by the arbitrator which relief was granted on 23 February 2018 by Masuku J, and condoning respondent's non-compliance with the rules of the Labour Court for not prosecuting the appeal within 90 days and reinstating the same. He remitted the matter to the arbitrator to re-hear the evidence of the appellant and that of Mr Petrus Amunyela on a date convenient to the parties but to be completed within 60 days of the order of 23 February 2018 and that the evidence of the appellant to be transcribed and lodged with the Labour Court 15 days after the hearing. It is in that order respondent was afforded the opportunity to supplement its grounds of appeal, if necessary within ten days after the record of such evidence is lodged with the Labour Court and the prosecution of the appeal to continue to run from the expiry of the ten days.

The record of the arbitrator was duly certified and dispatched to the Registrar of the Labour Court on 11 May 2018. On 21 June 2018, the record was filed on E-Justice and a hard copy filed with the appellant's lawyers Mbudje & Brockerhoff Legal Practitioners on 9 July 2018. The appellant or his lawyers failed to file a statement of opposition in terms of rule 17(16)(b) within 21 days. The statement instead of being filed on 12 July 2018 was only filed on 16 August 2018. The reason for the delay was given as the partner in the law firm Mbudje & Brockerhoff Legal Practitioners responsible for labour matters omitted to do his work and that the partnership dissolved on 31 July 2018. The partner who attested to the affidavit on condonation stated that he was blank on labour matters. He had to seek help from a Mr Beukes of another law firm. On prospects of success, all that was said was that respondent's notice of appeal was a nullity, as in place of appealing to the Labour Court on questions of law in terms of s 89(1) of the Act, the respondent argued facts in its notice of appeal and that the findings of the arbitrator were correct in law and on the evidence and that the finding of dismissal being procedurally and substantively unfair was correct.

[10] The Labour Court on 28 February 2019 declined the application for condonation for want of a reasonable explanation, holding that the squabbles between the partners in the running of the practice could not be regarded as good cause for the non-compliance with rule 17(16)(a) and (b). The court *a quo* appears to have dismissed the condonation application on the first leg of the enquiry (the reasonable explanation). Notwithstanding that that court continued to consider the

grounds of appeal as raised by the respondent against the award and found that they were unopposed and therefore the arbitrator could not have arrived at the decision he made, preferring the version of the appellant as against the versions of Messrs Dikua and Amunyela as witnesses for the respondent at the arbitration proceedings, which versions the court found was unchallenged.

[11] The appellant on 20 March 2019 sought leave to appeal against the whole judgment and order of the court *a quo*, which leave was refused on 1 November 2019.

#### In the Supreme Court

[12] On 3 December 2019, appellant petitioned the Chief Justice and leave to appeal against the judgment and order of the Labour Court was granted on 19 March 2020. Notice of appeal to prosecute the appeal was only filed on 11 June 2020. The notice of appeal was filed with the application for condonation for failure to file the notice of appeal on time. The reason for failure to file on time is given as the leave to appeal was granted at the time, a week later a State of Emergency was declared and subsequently a lockdown. It was during the same period appellant parted ways with his lawyer, he allegedly seemed to lack faith in his case. He had to wait until the lockdown was eased, that is 5 May 2020 before he could approach the Legal Aid Directorate (the Directorate) to assign him another lawyer. At that date he informed the Directorate that he would like to work with his lawyer of record, Mr Siyomunji. He

consulted with him on 20 May 2020 and the notice of appeal was then filed on 11 June 2020.

[13] In paragraph 7 he states that the delay was not deliberate but it is because he is a layman who depended on the services of a lawyer to facilitate any processes regarding the appeal. He assures the court that he has very good prospects of success. The record of the proceedings was subsequently filed on 15 September 2020 accompanied by a condonation application which is not contained in the bound record but a separate application to the record. The delay to file the record is given as that, once appellant could not find the record of the proceedings with Mr Rukoro who allegedly had had the record transcribed, they had to seek the necessary permission from the Directorate in order to have the record transcribed. It is not clear from the affidavit when was that period or when was the permission granted. Again on prospects of success, he only assured the court that appellant has prospects of success.

[14] Appellant appeals the whole judgment and order made by the court *a quo* with leave of this court.

[15] In this court, appellant's lawyer of record filed yet another condonation application on 22 September 2021 as the heads of argument were filed out of time. The reason for the delay is, 'I was engaged in various trials (*sic*) prior to the filing of the heads of arguments, which the most recent trial I have attached herein as Ms I' (A

trial before Liebenberg J case No: CC 19/2013, which case from the order of 13 April 2021 was set down for the periods 30 August – 03 September 2021 and 13-17 September 2021). In his affidavit counsel for the appellant again reassures the court that appellant has good prospects of success.

*Submission - Appellant*

[16] Counsel for appellant in his heads of argument refers to the matters of this court on condonation and repeats appellant's affidavit why the notice of appeal was filed late and does the same thing with his affidavit, why the record was filed late. He then makes a submission that the delays were thoroughly explained and that there were no blatant disrespect of the rules. He argued that respondent would not be prejudiced if condonation was to be granted. On the prospects of success, counsel supports the finding of the arbitrator and hallows the conspiracy theory against the appellant by Messrs Eiseb, van Zyl and Ms van Wyk. The submissions on that point are in this form.

**'D. PROSPECTS OF SUCCESS**

14. The appellant it is respectfully submitted has good prospects of success in that:
  - 14.1 The finding of the arbitrator was correct in law and on the evidence as tendered before the arbitrator.
  - 14.2 The dismissal of the appellant was both procedurally and substantively unfair.
  - 14.3 The witnesses who came testify at the hearing of the appellant that indicated that they did not have a problem with the appellant were

being untruthful since a history showed that the relationships were not sound at all.

- 14.4 Consistency was expected in the testimony of Dikua and Mr. Amunyela who claimed to have been present during the time that the payment was allegedly made, however their versions could not corroborate each other.
- 14.5 Mr. Amunyela was not a reliable witness in that there was several inconsistencies and contradictions in his testimony.
- 14.6 Contradictions in the testimony of Dikua were obvious in that he could not even corroborate the version of his mother who came to testify and that the version of the mother is most probable.
- 14.7 Mr. Van Zyl failed to show the standard of procedure in reporting the incident and procedurally directly reported to Mr. Eiseb instead of the driver or the immediate supervisor, Korupunda at 02h00 or 03h00 to 04h00 in the morning.
- 14.8 That Mr. Eiseb confirmed during cross-examination that he was expecting the telephone call of Mr. Van Zyl during the early morning hours between 02h00-04h00, which is an odd hour to contact a superior on his mobile phone and thereby substantiating the appellants version.
- 14.9 That Eiseb should not have been involved in the hearing of the appellant given the strenuous relationship between the appellant and Eiseb and given the fact that Eiseb once had appellant arrested and also the fact that a senior manager, Mr. Struggle Lihuhwa recommended after a grievance hearing that Eiseb should not be involved in cases of the appellant.
- 14.10 A reasonable apprehension of bias exists on the part of the chairperson of the initial disciplinary hearing in that the initiator Mr. Eiseb and the chairperson travelled in the same vehicle from Windhoek to Walvisbay where the hearing was concluded; that the two slept at the same place during the hearing that the chairperson also visited the cottage of Mr. Eiseb in Swakopmund.

- 14.11 The chairperson interrupted the appellant during the hearing at such a point that the appellant wanted to walk out of the proceedings as he felt that the chairperson was not objective.
- 14.12 The appeal chairperson was not objective and failed to adequately consider the record in that he found that the appellant admitted taking the money from the young boy despite the record reflecting that the appellant pleaded not guilty.
- 14.13 In considering whether re-instatement as a possible award, the breakdown in the trust relationship due to dishonest conduct can only be substantiated if the dishonest conduct was proven and that was not done.
- 14.14 The arbitrator on a proper evaluation of the facts and evidence placed before him correctly concluded that the defendant was dismissed.
- 14.15 The arbitrator on a proper evaluation of the facts and evidence placed before him correctly concluded that the first respondent was dismissed unfairly.'

[17] Counsel was confronted in his oral argument why the details of the prospects of success were not contained in both affidavits. His argument was that the assurance or mention that appellant has prospects of success is sufficient compliance as the elaboration would be made in the heads of argument.

[18] On the late heads of argument, counsel argued that the heads were ready on the day they were supposed to be filed but he had to send them to be bound at Hibachi Transcription Services (Hibachi).



*Submission - Respondent*

[19] Respondent argued that, it is common cause that true to form, the appellant continued on what has now become the norm insofar as the prosecution of appeals is concerned – a typical lackadaisical fashion when the appellant delayed to file the statement of opposition, to respondent's appeal before the court *a quo*. The court *a quo*, he argued, declined to accept the terse explanation for the non-compliance with rule 17(16)(a) and (b) of the Labour Court Rules and held that he failed to show good cause justifying the condonation application.

[20] On the merits, respondent argued that appellant dismally failed to deal with the direct adverse evidence (Dikuaa and Mr Amunyela) against him. The evidence of the two is that appellant took money from Dikuaa on the train, which evidence of the appellant was untenable to the farfetched, which included, conspiracy against him, that he was fatigued due to long working hours, that he missed Dikuaa on the train as he possibly hid 'somewhere' on the train from him, that Dikuaa was planted by Mr Eiseb at Usakos, that Dikuaa is an opportunist, he could not be found at the addresses he furnished (school and residential), that Mr Amunyela was paid to lie, that Mr Amunyela felt sorry for Dikuaa and hence had to lie for him, that the Transnamib management is corrupt and the appeal chair was under their influence, etc. Therefore the court *a quo* was correct to have refused the condonation application and setting aside the award. It was further argued that the respondent satisfied both procedural and substantive requirements when the appellant was accorded a fair hearing and dismissed for a fair reason. That the arbitrator

misdirected himself when he held that there was no convincing evidence to prove that appellant was guilty of the charges he was charged with, and/or upheld the conspiracy theory against the appellant.

### *Condonation*

[21] The above account, how appellant opposed the appeal in the Labour Court and prosecuted same in this court, makes it plain that at every turn the appellant failed to comply with the Rules of the Court. In the Labour Court, the reason given for the non-compliance with rule 17(16)(b) is that there was a feud between the two partners in Mbudje & Brockerhoff Legal Practitioners that led allegedly to the dissolution of the partnership and that Mr Brockerhoff who was appointed by the Directorate to oppose respondent's appeal was blank when it came to the Labour Act as he was a criminal lawyer. It is accepted that, whilst an appellant should not be prejudiced by his or her attorney's incompetence, there is a degree beyond which a litigant cannot be excused thereby.<sup>2</sup> To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.<sup>3</sup>

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<sup>2</sup> *Aymac CC & another v Widgerow* 2009 (6) SA 433 WLD at 451D.

<sup>3</sup> *Saloojee & another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E.

[22] In *Kleynhans v Chairperson of the Council for the Municipality of Walvisbay & others*<sup>4</sup> this court referred with approval to the sentiments of Gautschi AJ in *Aymac CC & another v Widgerow* where at 451J-452A-B he said:

“[39] Culpable inactivity or ignorance of the rules by the attorney has in a number of cases been held to be an insufficient ground for the grant of condonation. See *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121C-122C. The principle established by these cases is that the cumulative effect of factors relating to breaches of the rules by the attorney may be such as to render the application for condonation unworthy of consideration, regardless of the merits of the appeal.”

[23] *Albeit* for different reasons the court *a quo* exercised its discretion correctly to refuse the condonation application. After all rule 17(16)(b) speaks for itself, I cannot see how Mr Brockerhoff allegedly with his limited knowledge of the Labour Act could have failed to file a statement of opposition as required by the rule.

[24] In this court the appellant’s explanation for the dilatory filing of his notice of appeal is that a week after leave to appeal was granted on 19 March 2020 by this court, a state of emergency was declared followed by in the words of Mr Siyomunji, ‘a total lockdown’. That appellant waited for an opportunity to go to the Directorate to explain to them why he was dropping his then legal representative. That appellant secured that opportunity on or about 5 May 2020 when the lockdown was eased. The consultation was on 20 May 2020 and the notice of appeal was filed on 11 June 2020.

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<sup>4</sup> 2013 (4) NR 1029 (SC) at 1031J-1032A.

[25] Appellant does not explain why immediately after the leave to appeal was granted on 19 March 2020 before the lockdown he did not approach the Directorate. In his oral arguments Mr Siyomunji could not explain why appellant could not phone or email the Directorate. His reply was that appellant wanted to visit the Directorate physically. In his affidavit appellant states that at the Directorate he informed them that he wanted to work with Mr Siyomunji. If that was all he informed the Directorate in person, he could have called or emailed the Directorate.

[26] Even if I were to accept the excuse of the state of emergency there is still no explanation why after appellant had been to the Directorate on 5 May 2020, the consultation was done two weeks later when he was aware that the filing of the notice was very late at the time. From 19 March 2020, the notice of appeal should have been filed by 21 April 2020. Worse still, after the consultation on 20 May 2020, the notice of appeal, a four page document, which is silent on prospects of success was filed three weeks later, on 11 June 2020. No explanation is offered for that delay either.

[27] In *Kleynhans*,<sup>5</sup> this court referred with approval the sentiments of Gautschi AJ in the *Aymac CC* matter above, where at 452B-D he said:

“[40] There is a further reason why the court should not grant condonation or reinstatement in the face of gross breaches of the rules. Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated*

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<sup>5</sup> At 1032B-D.

*Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363A in which Holmes JA said the following concerning the late filing of a notice of appeal:

The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment – the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn* 1912 AD 181 at 193, in which SOLOMON JA said:

After all the object of the Rule is to put an end to litigation and to let parties know where they stand.”

[28] The condonation application of the late filing of the record was attested to by Mr Siyomunji. That application too except for the terse statement that there are prospects of success, the details were omitted. The explanation for the late filing of the record is that when the former lawyer, Mr Rukoro, could not provide the record which was allegedly already transcribed, they had to seek permission from the Directorate to have the record transcribed. In his affidavit, he concedes that the notice of appeal was filed about two months late. He continues to say, they were already late in filing the record but he could not seek an expedited transcription of the record because he was advised that the Directorate has difficulties in settling urgent records' invoices from Hibachi and had to wait for their turn, whatever that is.

[29] The application is silent on when the permission was sought and when it was granted, who advised that the Directorate was a bad debtor on urgent records' invoices, how long they had to wait for their turn. But surprisingly the record was filed exactly three months later, 11 September 2020, after the notice of appeal was filed on

11 June 2020. Look at it from that perspective, appellant, notwithstanding the concession that the notice of appeal was filed almost two months late on 11 June 2020 that date was considered to be the anchor to file the record within three months.

[30] Be that as it may, the explanation offered for the delay in this instance like the application on the notice of appeal, is not sufficient and to warrant the grant of condonation coupled with the fact that both applications omitted the details of the prospects of success, one can safely say, they are both defective. The applications fail to meet the threshold principles so aptly articulated in numerous cases of this court on the same subject matter.<sup>6</sup> In fact, appellant in his heads of argument refers to four of the cases. What is conspicuously omitted in both applications among others is the principle that, the affidavit accompanying the condonation application must set out a full, detailed and accurate explanation for the failure to comply with the rules.<sup>7</sup>

[31] As I have already stated, this is a case where at every turn the appellant failed to comply with the rules of the court. The heads of argument were filed late too. The explanation in the affidavit was that Mr Siyomunji was involved in a criminal case, the last trial date was 17 September 2021. But that case was postponed to the dates of 30 August – 3 September and 13-17 September 2021 on 13 April 2021 already. The court roll for this term of this court and set down dates particularly the hearing date of this case must have been communicated sufficiently on time to the appellant. In his

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<sup>6</sup> *Felisberto v Meyer* (SA 33/2014) [2017] NASC 11 (12 April 2017). *Balzer v Vries* 2015 (2) NR 547 (SC). *Tweya & others v Herbert & others* (SA 76/2014) [2016] NASC 13 (6 July 2016), *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC).

<sup>7</sup> *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at 640A.

affidavit, Mr Siyomunji stated that the heads of argument were late two days but on a proper computation of the *dies* he should have filed on 13 September 2021 and not 22 September 2021. In court he argued that, the heads were ready but he had to take them to Hibachi to be bound. Constrained with time, he could have bound them himself, they are only eleven pages. That was not all, the heads of argument were not paginated neither were they indexed.

[32] I adopt the sentiments of Muller JA in the matter of *PE Bosman Transport Works Committee & others v Piet Bosman Transport (Pty) Ltd*<sup>8</sup> where he said:

'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is not acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.'

And at 799H:

'In the present case the breaches of the Rules were of such a nature, and the explanation offered in many respects so unacceptable or wanting *that, even if virtually all the blame can be attributed to the applicants' attorneys*, condonation ought not, in my view, to be granted.' (My own emphasis).

[33] For the omissions referred to herein there would be no need to consider the prospects of success but I find it necessary given the history of this case, to consider the appellant's prospects briefly.

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<sup>8</sup> 1980 (4) SA 794 (A) at 799D-E. See also fn 4 at 1035G-I.

*Prospects of success*

[34] In this court appellant is seeking to overturn the refusal of his condonation application by the Labour Court and the setting aside of the award granted in his favour by the arbitrator. He supports the finding by the arbitrator that his dismissal by the respondent was substantively and procedurally unfair.

[35] The facts in this case are brief and are encapsulated above under the history of this case. Dikua and Mr Amunye testified at both the misconduct enquiry and at the arbitration proceedings. Appellant's version at the misconduct enquiry is that he did not see Dikua on the train that day. At the arbitration proceedings he was emphatic that Dikua was not on the train that day. On this point, Dikua is corroborated by his mother who testified that she gave him money for the train fare and upkeep. Mr Amunye also testified that Dikua was on the train and he saw when Dikua gave appellant N\$100. The four witnesses, employees of the respondent namely, Mr van Zyl, Ms van Wyk, Ms Kharugas and Ms Korupanda confirm that he was on the train and he was without a ticket and was not on the train list or plan. Therefore there is evidence *aliunde* that Dikua was on the train and appellant's denials are without any basis and the arbitrator should have rejected his evidence on that point.

[36] Did the appellant receive N\$120 from Dikua meant for the train ticket that day? The answer should be in the positive. Dikua testified that when appellant approached him, he initially gave a N\$100 which Mr Amunye confirmed he saw



when it was given to the appellant. Appellant failed to challenge the evidence of Dikuua at the misconduct hearing. He rather asked Dikuua irrelevant questions or questions suiting his conspiracy theory against him. The cross-examination of Dikuua by appellant proceeded as follows:

- 'Q. You said you paid for N\$120 and you did not receive the ticket, was it not inconvenient for you?
- A. It was not, because I know I have paid.
- Q. The three ladies who came to inspect the train did they asked for your contact details so that they contact you?
- A. Yes, they did, they asked for my physical address, the school name, as well as my mom's cellphone number.
- Q. Did you give them the contact details?
- A. Yes
- Q. Do you know Mr Nick Beukes?
- A. No.'

[37] The last three questions fits well in the conspiracy theory created by appellant. From the record of the misconduct enquiry it appears that Dikuua was the last witness for the respondent. Appellant called a witness, one Mr Hermanus Nauseb who testified that a Mr Karon had sent him to verify the residential address of Dikuua, which address he had made available to the three officers who took down a statement from him on the train. He went to the said address but all that he could find was an electrical box. He went back to Mr Karon and reported his findings. Mr Karon sent him to the school to find Dikuua. He went and the principal of De Duine School informed him that there was no such a person at the school. The principal must have

given him something in writing to that effect, which he must have given to Mr Karon.

At the end of leading his witness, appellant asked Mr Nauseb the following questions:

'Q. For you as security was it not strange, someone gave that false details to the company?

A. Yes, it was strange to me someone gave false details and I was wondering what was his intention.

Q. How do you regard the person who gives false information to the company?

A. As unreliable, untruth and this person was aware that there is no such address.'

[38] The misconduct inquiry record shows that before the closing submissions because appellant was insisting that Dikuua's evidence should be purged from the record for the reason that the residential address he provided did not exist as well as the fact that he was not a learner at De Duine School, the chairperson sent the same security guard and one Mr Noabeb to the residential address Dikuua had provided (33 Sardyn Street) and the school. They returned and Mr Nauseb testified that they found the house where Dikuua resided, which was 50 metres from the electrical box, Mr Nauseb initially went to. The school De Duine also confirmed Dikuua as a learner at the school.

[39] In fact when cross-examined by Mr Eiseb, the inquiry initiator, the following question was put to appellant.

'Q. Are you aware that five witnesses testified that Dikuua was on your train on the 10 August 2015?

A. Yes, I am aware of that conspiracy which is not difficult to do.'

The above question was asked after appellant had responded to a previous question as follows: 'I paid in the money I received meaning if Dikuua's money is not here then he was not on train'.

[40] For the arbitrator to have disregarded all this evidence and accept that of the appellant who had farfetched explanations for the incident, namely, either the boy did not exist at all or if he did exist he was part of a conspiracy to frame and implicate him, if the boy was on the train . . . that day he must have been hiding, he flouted the basic rules of evidence. It is so clear from the evidence that Dikuua was on the train and gave the appellant N\$120 for the ticket which he was not issued with. Therefore the finding by the arbitrator that appellant's dismissal was substantively unfair was a serious misdirection.

[41] On the procedural unfairness point, Mr Muesee (the misconduct chairperson) testified that 'the applicant never mentioned any procedural issues in his closing arguments but referred to 'objectivity of Mr Muesse'. Mr Chris Sono, the chairperson of the Disciplinary Review Committee, found that 'the accused (appellant) in referring to procedural unfairness was referring to the investigation and not to the disciplinary procedure'. Indeed that is the case, the arbitrator on that score was influenced by extraneous considerations which were not part of the evidence on the charges against the appellant. These include the bad blood between Mr Eiseb and appellant.

Mr Eiseb should not have been the initiator or be involved in this case at all so was the investigator (Ms van Wyk) who her sin was to have been found unreliable in unrelated case previously. Mr Eiseb and Mr Muesee travelled in the same vehicle from Windhoek to Walvisbay and slept at the same hotel, when in actual fact the respondent offered a vehicle to transport everybody involved in the misconduct inquiry to Walvisbay for further hearing including the appellant. Mr van Zyl did not follow the procedure when he reported the incident directly to Mr Eiseb at odd hours of the morning. Had he reported to the train driver there would have been records of evidence and appellant would not be disputing whether Dikua was on the train when he left or was brought in on purpose in Usakos to frame him. These conclusions are absurd to say the least. The arbitrator went on to say, 'I am afraid to mention that I have many reasons not to believe these witnesses. There are so many things they did, or did not do, said which made me believe that most probably the applicant's version is the most probably acceptable one.'

[42] By any standard, these are not procedural issues. The misconduct enquiry record reveals that appellant chose to conduct his own defence, testified and called a witness, cross-examined witnesses against him and made closing remarks, filed internal appeal and review. The chairperson of the misconduct hearing recorded during the cross-examination of Mr van Zyl by appellant the following: 'It is worth mentioning that Mr Nakambonde wanted to leave the hearing to be conducted in his absentia because he was annoyed by the way the IR and chairperson were trying to

correct or guide him, after IR officer advise and explain to him what will happen if he leave he continue with hearing.’

[43] This in my opinion tends to show how fair the chairperson was. That being the case, the findings of the arbitrator of appellant’s dismissal being substantively and procedurally unfair are not supported by the evidence adduced before him. The assertions of a conspiracy against the appellant are unfounded and baseless.

#### Costs

[44] This being a legal aided and labour matter there will be no cost order.

#### Order

[45] The following order is made.

1. The applications for condonation for the late filing of the notice of appeal and record are refused.
2. The appeal is struck from the roll.
3. No order as to costs.

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**HOFF JA**

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**UEITELE AJA**

APPEARANCES:

Appellant:

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Instructed by the Directorate of Legal  
Aid

Respondent:

T C Phatela

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