



REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

Case No: LC 33 / 2009

In the matter between:

TELECOM NAMIBIA LIMITED

APPLICANT

and

MICHAEL NANGOLO AND 34 OTHERS

RESPONDENTS

CORAM: DAMASEB, JP

HEARD ON: 28 NOVEMBER 2011

DELIVERED ON: 28 MAY 2012

APPLICATION FOR CONDONATION

DAMASEB, JP: [1] The arbitrator gave a ruling on 13 March 2009
in the following terms:

"That the respondent pays each of the applicants an amount made up as follows:

(i) Severance payment: 10 weeks × N\$1038.21=N\$ 10 382.00

Being one week of each completed year as per the Labour Act(Act 11 of 2007),section 35(1)(a)

(ii) Leave days: 70 days each (Based on the balance of probabilities).

N\$ 10 382.00 ×30 employees = N\$ 311 460.00

Thus: N\$ 12 110.00 × 30 employees = N\$ 363 300.00

Total amount to be paid: N\$ 674 760.00

The said amount to be paid at the office of the Labour Commissioner on or before the 30th of April 2009.

Interest at a rate of 20% per year to accrue on outstanding amount.

This award is final and is binding on both parties."

[2]The applicant seeks condonation¹ to pursue an appeal out of time in terms of section 89(3) of the Labour Act of 2007 (Act 11 of 2007) (hereinafter referred to as the Labour Act). Being a request for an indulgence, applicant needs to show 'good cause' i.e. it must advance reasonable and acceptable reasons for the delay and must satisfy the court that it has good prospects of success on appeal. The appeal is against an award made by the arbitrator, Mr. Phillip Mwandangi dated 13 March 2009.

¹ Sub rule (3) of rule 89 reads:

"(3) The Labour Court may condone the late noting of an appeal on good cause shown."

(This subrule should be read with rule 15)

The law

[3] It is common cause that in terms of sec 89(2) of the Labour Act, the award ought to have been appealed on 06 May 2012. However, the notice of appeal was only filed on 13 May 2009. The application for condonation was then brought only on 25 June 2009 i.e. more than a month after the late filing of the notice to appeal. The applicant seeks the following relief:

1. Condoning the appellant's late filling of its notice of appeal, insofar as this may be necessary.
2. Costs of suit (only in the event of opposition to this application)
3. Further and/or alternative relief.

Section 89 of the Labour Act, 2007 (Act 11 of 2007) reads:

'89 Appeals or reviews of arbitration awards

(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86-

(a) on any question of law alone; or

(b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.

(2) A party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on the party.²

² Rule 17 of the Labour Court rules also prescribes the same period within which an appeal or review should be noted.

[4] The importance of the rules of court has been explained in the following terms by the Full Bench of the High Court:³

" The Rules of Court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance."

[5] The following principles can be distilled from the judgments of the Courts as regards applications for condonation:

1. It is not a mere formality and will not be had for the asking.⁴ The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.⁵
2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.⁶
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.⁷
4. The degree of delay is a relevant consideration;⁸
5. The entire period during which the delay had occurred and continued must be fully explained;⁹

³ *Swanepoel v Marais and Others* 1992 NR 1 at 2J-3A.

⁴ *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 12.

⁵ *Father Gert Dominic Petrus v Roman Catholic Archdiocese*, SA 32/2009, delivered on 09 June 2011, para 9.

⁶ *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13.

⁷ *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5.

⁸ *Pitersen-Diergaardt v Fischer* 2008(1) NR 307C-D(HC)

6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.¹⁰ (Legal practitioners are expected to familiarize themselves with the rules of court).¹¹
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.¹²
8. The applicant's prospects of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*¹³, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.¹⁴

⁹ *Unitrans Fuel and Chemical (Pty) Ltd v Gove -Co carriers CC* 2010 (5) SA 340, para 28

¹⁰ *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B; *Moraliswani v Mamili* 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.

¹¹ *Swanepoel, supra* at 3C; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para 47.

¹² *Swanepoel, supra* at 5A-C; *Vaatz: In re Schweiger v Gamikub (Pty) Ltd* 2006 (Pty) Ltd 2006 (1) NR 161 (HC), para; *Father Gert Dominic Petrus v Roman Catholic Diocese*, case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.

¹³ 1985 (4) SA 773 (A)

¹⁴ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

Factors taken into account whether or not to grant condonation

[6] These factors are stated in *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445, para 45 as follows:

1. The importance of the case;
2. The prospects of success;
3. The respondent's interest in the finality of the case;
4. The convenience of the court;
5. The avoidance of unnecessary delay.

[7] In the case of *Darries v Sherriff, Magistrate's Court, Wynberg and Another*¹⁵, the South African Supreme Court of Appeal stated:

'that an application for condonation for non-compliance with the law is not a mere formality but an application which should be accompanied with an acceptable explanation, not only, for example, the delay in noting an appeal but also any delay in seeking condonation.'

[8] Based on the authorities, before considering the prospects of success in the present case, I must be satisfied as to the following:

- (a) That the applicant /appellant has offered an acceptable and reasonable explanation for the delay.
- (b) That it has given a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.

¹⁵ 1998 (3) SA 34 (SCA) at 40I-41D

Evidence adduced in support of the application

[9] The supporting affidavit to the notice of motion was deposed to by one, Ms. Yvette Zoe Aspara, who is the assistant legal advisor of the applicant/ appellant.

[10] According to Aspara, the 34 respondents were previously contracted on fixed term contract by the applicant/appellant. The applicant is however uncertain of the exact identities of the 30 respondents in whose favour the arbitrator made the award and that the referral to the arbitrator refers only to Michael Nangolo as complainant. Of the respondents, only Michael Nangolo, Merves Kalipi and Solomon Kutondokwa were identified at the conciliation meeting although several others were at the venue of the conciliation on 9 February 2009. The arbitration award handed down on 13 March 2009 refers to Michael Nangolo and 29 Others who are not named. All the respondents were represented at the hearing by 2 trade union officials.

[11] Aspara also states that all the respondents here cited had their fixed term contracts terminated in December 2008 by mutual

agreement and that they were consequently paid their accrued leave in the same month.

[12] Aspara states that the arbitration hearing was held on 16 February 2009 and the arbitration award since received, is dated 13 March 2009. She deposes that the applicant's senior manager for Human Resources (who had attended the hearing of 16 February) was then called on 7 April 2009 by an official at the Labour Commissioner's office to collect a copy of the award. This, she says, was improper service in terms of the rules. Aspara also states that the award collected does not include the peremptory notice informing the parties of their right of appeal or review.

[13] According to Aspara, the senior manager Human Resources who received the award then waited for the arrival of her superior (one Reverend Gertze) who was then on leave and only returned on 14 April. Gertze was then given a copy of the award on 14 April and in turn handed it to the acting general manager for Human Resources (one Mushariwa) and advised the latter to bring the award to the attention of the applicant's legal department. It is worthy of note that it is conceded by Aspara that Gertze too

had attended the arbitration hearing on 16 February as the representative of the applicant.

[14] According to Aspara (and this is confirmed by Gertze) Gertze gave a full briefing to Mushariwa about the case, including the indication that the matter could be appealed against or reviewed. Mushariwa then briefed the managing director of the applicant on the same day (14 April) and asked his secretary to pass on the award to the secretary of the legal department who in her confirmatory affidavit confirms that she cannot remember receiving it or passing it on to the responsible person in the legal department. The award, therefore, never reached Aspara as was intended. Aspara was acting head of the legal department at the time. The consequence was that Aspara only received the award on 7 May 2009. She does not say from whom and in what circumstances. She also does not explain if any senior official of the applicant, especially the managing director, Gertze or Mushariwa had at any stage made inquiries if the matter was being attended to appropriately in view of the impending deadline for payment directed in the arbitration award.

[15] Aspara states that on 7 May the respondents then demanded payment in terms of the award and she then on that date briefed their legal practitioners of record to attend to the matter. She 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.

[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 in what is said about his handling of the matter that he took the decision to brief counsel practicing 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 practitioners 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. 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 if any an admitted legal practitioner in the firm played in the briefing of counsel. This entire handling of this matter by the applicant's legal practitioner of record raises serious issues of professional ethics. A copy of the judgment will therefore be sent to the Law Society for study. The notice of appeal was then prepared and filed on 13 May 2009.

[18] Aspara then makes the following critical allegation:

"I confirm that 7 May was the first time any employee in the appellant's legal department became aware of the arbitration award. The Appellant's general manager for Human Resource, along with all 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."

[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 could 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 promotes 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 the suspect , and certainly unreasonable basis, that they could not find instructed counsel who are not identified.

Application opposed

[22] The respondents oppose the application for condonation. A *propos* the absence of a willful default they rely on the allegations of Gabriel Andumba, an official of the registered trade union representing the interest of the respondents. As

regards the delay, he states that they do not have knowledge of the internal procedures of the applicant and that the latter knew that the notice of appeal should have been handled by the Legal Department but applicant's officials were circulating the award from one department to another until the prescribed time lapsed. With regard to the prospects of success, the respondents deny, without elaborating, that the appellant has good prospects of success on appeal.

Finding on reasonableness 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, either 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 condonation. The application is singularly and demonstrably lacking in that regard too.

[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.

[25] In my view, there was substantial compliance in that the Labour Commissioner's office called the very person who attended the arbitration hearing to collect the award - which she did. Similarly, although the award did not spell out the right to appeal, there was no prejudice in the applicant's case - a large company with an in-house legal department - in that its officials who received the award well within the period for launching the appeal, knew of the right of appeal, as evidenced by the testimony of Gertze, particularly his intimation to other colleagues of possible bases of appeal or review, even before the period within which to appeal ran out.

Prospects of success on appeal

[26] The part of the Arbitrator's award sought to be impugned on appeal reads:

"that Telecom shall pay to each of the respondents an amount in respect of severance and accrued leave pay".

The award includes an order in the following terms:

"The said amount to be paid at the office of the Labour Commissioner on or before the 30th of April 2009."

[27] The respondent's case before the arbitrator was that they were employed as technical assistants since 2000 on 'fixed term renewable contracts' for the period 2000-2008 and were, upon their services with the applicant being terminated, entitled to severance on account of their services to the applicant. Since Telecom had made clear to them that it was no longer going to employ them, the respondents claimed severance pay of 10 years from 2000-2008: 2 weeks for each year worked.

[28] On the contrary, the applicant's case was, and remains, that for the years that the respondents rendered services to it; they did so as employees of Africa Personnel Services (APS) until later directly engaged by Telecom. It maintains that there was no promise of their permanent employment. The applicant/appellant maintains further that it had no difficulty paying for accrued leave, except that the employees could not tell how much accrued days each was owed.

[29] The applicant / appellant further maintains that already in September 2008, the respondents knew that their services were required only until December 2008 and that the accrued leave claimed was already paid out to the applicants, together with their bonuses, in December 2008. As regards severance pay, the applicant/ appellant maintains that the respondents were not entitled thereto because they were on fixed term contracts and were not employed continuously for 12 months or more on any given extended contract.

[30] The arbitrator found as follows:

"The claim by the respondent that the applicants were for many years not Telecom employees, but that of the Africa Personnel Services, was discounted by documentary evidence, in form of pay slips, submitted by the applicants as evidence. By 2000 already they were receiving salaries from (Telecom) respondent, as the pay slip borne Telecom emblem (sic). One question one would ask is if these contract employees were not employees of Telecom Namibia, by 2000, why did Telecom Namibia bothered to pay employees employed by somebody else?"

[31] This logic and reasoning is difficult to fault, particularly if regard is had to the following factual finding by the arbitrator:

"What makes this case difficult is the absence of clear records. Such records could be useful, especially when it come to issues as accrued leave days and severance allowance."

[32] The applicant's conduct and admission of liability in respect of accrued leave corroborates the respondents' version that the applicant/appellant had treated them as its employees or that they had the reasonable expectation to be so treated and therefore entitled to severance pay on termination. The basis of challenge on appeal as regards the arbitrator's factual finding that the applicant's conduct over the years amounted to establishing an employer/employee relationship between it and the respondents, has no reasonable prospect of success on appeal; to say the least. The broad grounds seeking to impugn quantum awarded by the arbitrator are also undermined by what appears to be admissions made at the hearing by the applicant, and recorded in the following terms by the arbitrator:

"What made this case difficult is the absence of clear records. Such records could be useful, especially when it come to issues such as accrued leave days and severance allowance. The parties appeared to have reached consensus that all leave due to employees, if not paid out, should be paid out in full. What intensified the mystery is the lack of credible records or data to indicate outstanding leave days for each applicant. It is also a mystery as the respondent has a sophisticated payment system and this has resulted in it not being able to say with certainty whether, indeed leave days of all employees were paid out in December."

[33] And very crucially the arbitrator found:

"The above arguments also applied to the calculations of severance payments if any, as there are no records to show exactly when each of the applicants commenced working for the respondent." (My underlying for my emphasis)

[34] The arbitrator found the case difficult because of the absence of records. The parties appear to be *ad idem* that all leave days due should be paid for but were hamstrung by the absence of clear records. In my view, the common cause fact of the records being in a poor state militates against the suggestion that the arbitrator was wrong in so far as he made a finding based on the poor state of the records. The employer should have kept those records but did not. It would be to place too onerous an obligation on the employee to have kept such records. After all, on what basis did Telecom account to the Board of Directors and the revenue authorities in respect of the expenditure incurred on these employees? I am satisfied therefore that there are no reasonable prospects of success on appeal.

[35] The arbitrator's findings on the crucial issues which he had to resolve were compounded by the applicant's ambivalent conduct towards the respondents, and the failure on applicant's part (a large corporation with substantial resources at its command and holding a stronger bargaining position compared to the respondents) to keep decent records - to the respondents' potential detriment - which could with great ease have conclusively settled the legal issues which were in dispute before the arbitrator.

[36] One issue that exercised my mind is whether the appeal also raises the question that the arbitrator strayed in making an award in favour of persons who were not claimants (or were not identified) in the proceedings before him. It appears common ground that the arbitrator had represented before him 30 individuals by the trade union. The record does not show the identities of these persons. The applicant's affidavit shows that there were 34 individuals who fell in this class of worker and that barring the 3 specifically mentioned in the complaint, the referral and the conciliation, it is not clear who, of the 34, form part of the 30 persons in respect of whom the award is made. This allegation is admitted by Andumba on behalf of the respondents but sadly he does not enlighten the court just who the individuals are who form part of the 30 claimants in respect of whom the award has been made. How then, it may be asked, can the applicant know to whom to effect payment in addition to the three named individuals?

[37] The notice of appeal reads in relevant part:

"The arbitrator erred in law in concluding that all respondents and not just the particular respondents in respect of whom evidence was presented at the hearing, were entitled to severance payments and payments in lieu of accrued leave days, based on 10 completed years of service in the employment of the appellant, or were entitled to any relief at all."

[38] Arising there from the question of law is then stated to be:

"The finding that all of the respondents had been in the continuous employment of the appellant at the termination of their respective contracts in December 2008: was never alleged or proven by the respondents; does not appear from any of the documents handed up and/or accepted into evidence by the arbitrator; cannot be reasonably drawn from any other facts presented at the arbitration hearing."

[39] Properly construed, this ground of appeal is directed at impugning a finding that it was proved that more than just the three individuals about whom evidence had been led were entitled to the relief that the arbitrator granted. It certainly does raise the issue that people who were not claimants were granted relief by the arbitrator, as suggested by Aspara in her founding affidavit.

[40] The problem thus stated is not irresoluble. The arbitrator had given an award sounding in money in respect of severance pay. To quantify what that amount should be in respect of a particular claimant should not present insurmountable difficulty. Additionally, if of the 34 people cited as respondents, the applicant feels a particular individual seeking payment is not one of the 30 and is, in any way, not entitled it is not without relief. On that score, I am in respectful

agreement with and duly apply the following dictum of Wunsch J in *Butchard v Butchard*¹⁶:

"...there is no reason in principle or practice why a judgment for payment of a category of expenses which can be quantified without difficulty should not be able to sustain a writ, if the accrual and the and the amount of the expenses , on the basis of which liability therefor is established in a judgment, are proved, for example , by and affidavit of the judgment creditor. A writ is issued at the judgment creditor's risk. If the debtor disputes liability for the amounts reflected therein, for example because he says he has paid them or because he has been released from his obligation or because he contends that he is not liable for them on the ground that they are not within the scope of the judgment , he can apply to the court for relief". (Underlining supplied for emphasis)

[41] Although the judgment was written in a somewhat different context than the present in respect of especially the portions that are not underlined, the principle enunciated in especially the underlined part applies with equal force to the facts before me. The failure to specifically name the persons entitled to the relief is for that reason not fatal. I am satisfied therefore that in respect of the legal issue that I have said exercised my mind, there is also no prospect of success.

¹⁶ 1996 (2) SA 581(W) at 587.

[42] Even if I am wrong and it be found that there are reasonable prospects of success, this is the sort of case where in view of the gross failure to properly explain a delay for the prosecution of an appeal and the lateness of the condonation application, prospects of success ought not to be decisive.

Order

[43] I therefore make the following order:

(i) The application for condonation to prosecute the appeal against the arbitration award of Mr Mwandingi dated 13 March 2009, is dismissed.

(ii) The registrar is directed to forward a copy of the judgment to the Law Society of Namibia.

DAMASEB, JP

COUNSEL ON BEHALF OF THE APPLICANT: Mr. MAASDORP

INSTRUCTED BY: GF KOPPLINGER LEGAL PRACTITIONERS

COUNSEL ON BEHALF OF THE RESPONDENTS: MR. IIPUMBU

OF: TITUS IIPUMBU LEGAL PRACTITIONERS