



NOT REPORTABLE

CASE NO. LCA 09/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

TRENTYRE NAMIBIA (PTY) LIMITED

APPLICANT

and

L M SCHOLTZ

RESPONDENT

CORAM: CORBETT, A.J

Heard on: 22 November 2011

Delivered on: 11 June 2012

JUDGMENT

CORBETT, A.J.:

[1] In this matter an Arbitrator had found that the applicant had constructively dismissed the respondent and ordered that compensation be paid to her. On 5 February 2010 the applicant, in terms of section 89(2) of the Labour Act, No. 11 of 2007 (“the Act”), timeously noted an appeal against the Arbitrator’s award to this Court. After noting the appeal on 5 February 2010 the applicant’s legal practitioner states that he obtained a copy of the record on 27 April 2010. On 14 May, after verifying the record, he delivered a copy of the record to the legal practitioner representing the respondent and the matter was set down for hearing. However, on 15 October 2010 the appeal was struck from the roll due to the fact that it had lapsed and the applicant was ordered to pay costs. A further application was filed on 29 October 2010 wherein the applicant seeks an order that its lapsed appeal be re-instated together with ancillary relief. This is the matter that now falls to be determined.

THE PROCEDURAL CONTEXT

[2] In terms of the procedure provided for in the Rules promulgated in terms of the Act, once an appeal has been noted, the office of the Labour Commissioner must ensure that the record of the arbitration proceedings is

dispatched to the Registrar of the Labour Court within 21 days of receipt of the appellant's notice of appeal. Upon receipt of the record the appellant has to ensure that the record is complete, indexed and paginated and must provide two copies of the record to the Registrar and one copy to the respondent.

[3] Within 14 days after receipt of the respondent's statement of opposition, the appellant may in terms of Rule 17(17) apply for a date for the hearing, failing which the respondent may so apply in terms of Rule 17(18). Upon receipt of such application, in terms of Rule 17(19) –

“...the appeal is deemed to be duly prosecuted”.

[4] Moreover, Rule 17(25) directs that–

“An appeal to which this rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed.”

[5] It is within this procedural context that the application must be determined.

CONDONATION AND THE PURPOSE OF THE RULES OF COURT

[6] I am in agreement with Mr Barnard, who appeared for the applicant, that where a party has been in default the enquiry is not whether or not to penalise a

party for failure to comply with the rules of court¹. In applications for condonation the factors usually weighed by the Court include ² –

“... the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice ... The cogency of any such factor will vary according to the circumstances, including the particular Rule infringed ”.

[7] Generally the Courts have emphasised that condonation should be refused where it would defeat the purpose or object of the Rule of which the applicant is in breach. ³ In the labour context, the South African Labour Appeal Court has highlighted the purpose for determining time limits for the taking of procedural steps: ⁴

“The question then arises as to what purpose these provisions were intended to serve in the first place ? There can be no doubt that the rules of any court which constitute the procedural machinery of the courts, are intended to expedite the business of the courts (*Hudson v Hudson & Another* 1927 AD 259 at 267; *Viljoen v Federated Trust Ltd*, 1971 (1) SA 750 (O) at 754 D–E; *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1971 (4) SA 532 (C), at 491 D–E; *SOS–*

¹ See *Minister of Home Affairs, Minister Ekandjo v Van der Berg*, 2008(2) NR 548 (SC), 581F - G

² *Federated Employers Insurance Co. v McKenzie*, 1969(3) SA 360 (A), at 362F – G, quoted with approval in *Immigration Selection Board v Frank*, 2001 NR 107 (SC), at 109A – B, 164F - I

³ *Small Business Development Corporation Ltd v Khubeka*, 1990 (2) SA 851 (T), at 854 B – 855 B

⁴ *Sacca (Pty) Ltd v Thipe and Another*, [1999] 12 BLLR 1241 (LAC), 1246 para [27]

Kinderdorf International v Effie Lentin Architects 1993 (2) SA 491 (Nm), at 491D–E)

Consequently, they must be interpreted and applied in a spirit that will enhance and facilitate the work of the courts and enable the litigants to resolve their disputes in as speedy and inexpensive a manner as possible. (*Ncoweni v Bezuidenhout 1927 CPD 130; SOS – Kinderdorf, supra, at 491 D–F; Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4 ed. Juta, at 33*)”.

[8] Inherent to Rule 17 relating to the prosecution of an appeal in the Labour Court is the ingredient of expedition. The appellant is enjoined to act with haste so that the business of the Court may be concluded without undue delay. This approach accords with the truncated time periods within which a party may lodge a dispute in terms of section 86 of the Act, and also the time periods referred to in Rule 17. It is further to be found in section 119 (3) of the Act, which stipulates that the Labour Court Rules Board must advise –

“...on Rules of the High Court to regulate the conduct of proceedings in the Labour Court with a view to effecting a speedy and fair disposal of the proceedings.”

[9] In the matter of *Municipal Council of the Municipality of Windhoek v Marianna Esau and Another*⁵ the appellant in that case applied for condonation for its failure to prosecute the appeal in time and sought the re-instatement of the appeal. In contending that there was good cause for the relief claimed, the appellant set out what it had done to ensure that the office of the Labour Commissioner had dispatched the record of the arbitration proceedings timeously. Henning, AJ stated⁶:

[5] Between 15 June 2009 when the plea [should read “appeal”] was noted and mid February 2010 when the appeal could have been enrolled some 8 months have elapsed. This is a serious deviation from the 90 day period prescribed by rule 17 (25). The applicant relied heavily on a delay by the second respondent to make a transcript of the audio proceedings available to it, the very late furnishing of the exhibits by the second respondent, and ‘*an oversight and workload on the part of the Legal Practitioners of the Applicant*.’”

[10] Henning, AJ, after considering the steps taken by the appellant to obtain the record from the Labour Commissioner, said⁷:

[6] It seems that not much pressure was applied to activate the second respondent [the Labour Commissioner]...

⁵ Unreported judgment of the Labour Court under case number LCA 25/2009 delivered on 29 September 2010

⁶ at p. 2, para [5]

⁷ at p. 3, paras [6] and [9]

[9] Much of the criticism expressed in *Moraliswani v Mamili*, 1989 (4) SA 1 (AD) and *Ondjava Construction CC and Others v Haw Retailers t/a Ark Trading*, case no. SA 6/2009 (NmSC) applies to this case.”

The Court accordingly dismissed the application for condonation and the reinstatement of the appeal.

[11] In the *Ondjava* case⁸ Maritz JA referred to a remark by a Judge of Appeal who said⁹:

“Litigation is a serious matter and, once having put a hand to the plough, the applicant should have made arrangements to see the matter through.”

In exercising a discretion as to whether or not to grant condonation and reinstate a labour appeal, I accordingly distill a need by the Court to balance the factors mentioned in the *Frank* case with the weighty consideration of expedition required for the effective working of the dispute resolution mechanisms contained in the Act.

⁸ *Ondjava Construction CC and Others v Haw Retailers t/a Ark Trading*, 2010(1) NR 286 (SC)

⁹ At 291G

THE APPLICANT'S EXPLANATION

[12] After filing the notice of appeal the applicant's legal representative states that he waited to be informed by the Registrar of the Labour Court or the Arbitrator that the record of proceedings was available. He was thus aware of the 21 day period within which the record had to be filed. Despite this, and because "*the date of lapsing of the appeal was in the distant future*" he was not concerned. Applicant's legal representative states in vague terms about enquiries he made about the record, but confirms that he was informed around the middle of April 2010 that the record was available. He thereafter obtained a copy of the record in late April 2010 and filed a certified copy thereof on 14 May 2010. The delay is sought to be explained by reference to the time consuming process of verification of the record and the intervention of urgent work commitments, whatever those might constitute. No details were provided. On 23 June 2010 an application for a hearing date was filed and accordingly by virtue of Rule 17(19) that date was determinative of whether the appeal was deemed to be duly prosecuted.

[13] However, in terms of section 17(25) the period of 90 days provided for the prosecution of the appeal by applicant had already expired on 6 May 2010. The applicant's legal practitioner states that he at all times had assumed that the reference to "*days*" in the Act was a reference to "*court days*" (as in the previous Labour Act), whilst in reality the new Act referred to "*calendar days*". The legal

practitioner states that this matter was his first appeal in terms of the new Act and that he had accordingly made a mistake in the calculation of the relevant *dies*.

[14] Ms Van der Merwe, who appeared for the respondent, submitted that the explanation furnished was inadequate. It is common cause that the record was available in February 2010, but it is unclear as to why a formal request was not made for the record, or why the Registrar was not approached at an earlier opportunity. It was further submitted that the fact that the appeal constituted the applicant's legal practitioner's first appeal under the new Act placed an obligation on him to take more care. Counsel further submitted that, in any event, if this explanation is to be accepted, it does not constitute a *bona fide* mistake, since even if the calculation was done on the basis of "*court days*" the appeal should have been prosecuted by 21 June, but was only prosecuted on 23 June 2010. I consider that there is substance in Ms Van der Merwe's submissions.

[15] The applicant's notice of appeal was filed on 5 February 2010 and the appeal should have been prosecuted by 6 May 2010. The first application for condonation and reinstatement of the appeal was filed on 13 October 2010, more than 6 months after the applicant's appeal had lapsed. However, the applicant's legal representative's explanation that he made a mistaken assumption about the calculation of the dates causing the lapsing of the appeal lacks *bona fides* if regard is had to the fact that even on his incorrect calculation the appeal would have lapsed two days prior to its purported prosecution. This issue is fudged

and no explanation is given for this further remissness on his part. The Court takes somewhat of a dim view of this lack of forthrightness on his part.

[16] In this matter the Arbitrator's award was handed down on 18 January 2010. Due to the various delays, and the first application for condonation and reinstatement being struck from the roll in October 2010, the second application was only brought in November 2010. One would have expected the applicant's legal representative to have set this application down with alacrity. Instead it was the respondent who set this matter down and attended to the indexing of the papers herein. This is further substantiation, not only of the highly neglectful manner in which the appeal and the reinstatement thereof has been handled by the applicant's legal practitioner, but this conduct also constitutes the undermining of the spirit of expedition required by the Act and its Rules. As it was, this application was only set down on 27 September 2011, some twenty months after the Arbitrator's award was handed down. In my view the applicant has not dealt with this matter with expedition and the explanations for the delays are woefully inadequate.

[17] The applicant cannot shield behind its legal practitioners. I am guided by the decision in the *Moraliswani* case (referred to with approval by Henning AJ in the *Esau* matter), which applies with equal force to this matter: ¹⁰

¹⁰ *supra*, at p. 10 B - D

“In these circumstances the extent of the delays, and the failure of the plaintiff or his attorney to give a satisfactory explanation for them, are such that condonation ought, in my view, to be refused. The fact that much of the blame may be attributed to the plaintiff’s attorneys does not, in my view, detract from this conclusion.” As was stated in *Saloojee and Another NNO v Minister of Community Development*, 1965 (2) SA 135 (A), at 141 C:

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court”.

In the instant case any sympathy for the applicant has to yield to the more important principle that flagrant disregard for the Rules cannot be countenanced¹¹.

[18] In these circumstances, I am of the view that the application should be refused irrespective of the prospects of success¹².

¹¹ *Darries v Sheriff, Magistrate’s Court, Wynberg, and Another*, 1998(3) SA 34 (SCA) at 44E - F

¹² *Moraliswani case supra*, at 10E - F; *Esau case supra*, at 9; *Rennie v Kamby Farms (Pty)*, 1989(2) SA 124 (A)

CONCLUSION

[19] Section 118 of the Labour Act provides that the Court shall not make any order as to any costs incurred by any party in relation to proceedings instituted before the Court, except where in the opinion of the Court a party has in instituting proceedings “*acted in a frivolous or vexatious manner*”. Respondent seeks such an order. Given the conduct of the applicant and its legal practitioner in this matter, I am of the view that this application is indeed frivolous and one where it is appropriate that the applicant be mulcted in costs.

[20] For these reasons, I make the following order:

[20.1] The application is dismissed.

[20.2] The applicant is ordered to pay the costs of the application, such costs to include the costs of one instructing and one instructed counsel.

CORBETT, A.J

ON BEHALF OF THE APPLICANT

Adv. P Barnard

Instructed by Koep & Partners

ON BEHALF OF THE RESPONDENT

Adv. B van der Merwe

Instructed by P D Theron & Associates