



REPUBLIC OF NAMIBIA

CASE NO.: LCA 35/2011

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LIMITED

APPLICANT

and

ANTHONY ABRAHAMS

1ST RESPONDENT

OFFICE OF THE LABOUR COMMISSIONER

2ND RESPONDENT

CORAM: GEIER, AJ

Heard on: 14 February 2012

Delivered on: 14 February 2012-03-12 (*Ex tempore*)

JUDGMENT

GEIER, J: [1] Consequent upon his dismissal from the employ of the Applicant, the 1st Respondent lodged a complaint with the Office of the Labour Commissioner.

[2] Upon mediation failing, the matter was arbitrated upon. The Arbitrator found in favour of the 1st Respondent on 20th April 2011. It was against these findings, that the Applicant noted an Appeal on 6 May 2011. This Notice was only served on the 1st Respondent on 19th August 2011. On 16 September 2011, Applicant brought an Application to condone the late noting of the Appeal also seeking certain other relief.

[3] In essence, as it was submitted by Mr Frank, who appeared with Mr Phatela on behalf of the Applicant, this was an application for the re-instatement of an Appeal, which had technically lapsed.

[4] In his answering papers, the 1st Respondent inter alia took the point that the Applicant had failed to show '*good cause*' and more particularly, while the Applicant had endeavoured to explain its default, it had nevertheless omitted to deal with the prospects of success of the Appeal. It was for purposes of remedying this defect, that a further Application was filed on 16th January 2012, to procure the admission of a further affidavit, styled 'Supplementary Affidavit', onto the record.

[5] The further affidavit essentially deals with two aspects:

- 5.1 It explains the Applicant's failure to have served the requisite Form 11 together with Form LC41 on the 1st Respondent when it noted its Appeal.
- 5.2 It deals expressly with the Applicant's prospects of success on Appeal.

[6] The 1st Respondent has opposed also this Application.

[7] It was explained that due to an "inadvertent oversight", (of Applicant's legal practitioner), there was an unintentional non-compliance with Rule 17(3) of the Labour Court Rules, which resulted in the failure to serve Form 11.

[8] As far as the omission, to expressly deal with the requirement of the prospects of success, was concerned, the Applicant now contended that it had now annexed the Arbitration award, which should be read with the Notice of Appeal annexed to its founding papers and from which the Applicant's prospects of success - so to speak - in any event emerged.

[9] Although some argument also centered around the question as to whether or not the Court should, and could have regard to these annexures, I am convinced that the Court - even in the absence of this further affidavit - would have been quite entitled to have regard to those annexures.

[10] In so far, however, as this has not been stated expressly, the Applicant now contended in this further affidavit that it wished to make it clear that there were indeed good prospects of success and that it was now seeking the opportunity to address this material aspect of the Applicant's case by way of the filing of this further affidavit.

[11] It was contended, for instance, in this regard that the Arbitrator had exceeded the scope and ambit of the Labour Act in that he had dealt with certain aspects which were really in the domain of the criminal law.

[12] More importantly, it was now explained that the Arbitrator had materially misdirected himself in finding that theft, as opposed to negligence, was the ground for the respondent dismissal.

[13] The^{1st} Respondent also opposed this Application, on the ground that this Application had not been set down properly. On this aspect I have ruled already.

[14] It was also contended that the further affidavit contained no new facts and that the Applicant should, so to speak, stand and fall with the allegations contained in the founding papers.

[15] In any event, I pause to note that the Applicant reserved its rights to reply fully to the merits of the further Application should it be requested to do so, or be granted the opportunity to do so.

[16] The Court has a discretion to allow the filing of further affidavits.

[17] ‘This discretion should be exercised, against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues and dispute. While the general rules regarding the number of sets and proper sequence of affidavits should ordinarily and generally be observed, some flexibility must necessarily be permitted.’

[18] ‘It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be allowed’.

[19] ‘There should in each case be a proper and satisfactory explanation which negates *mala fides* or culpable remissness as to the cause of the facts or information not having been placed before the Court at an earlier stage and the Court must be satisfied that no prejudice is caused by the filing of additional affidavits’.

[20] I refer in this regard to the general exposition found in *Erasmus Superior Court Practice*.¹

¹ At p B1-47, (Service 37, 2011)

[21] Regarding the Applicant's explanation in this case, it appears that the Applicant's legal practitioners confessed that their failure to utilise Form 11, was caused, by an inadvertent oversight. I suppose that the same can be said in regard to their failure to address the important issue of the Applicant's prospects of success on Appeal.

[22] This certainly borders on culpable remissness, as for instance the requirements of '*good cause*' and what that concept entails, should be well known to legal practitioners engaging in the business of litigation.

[23] On the other hand, there are certainly no *mala fides* present - and I have not heard Ms Visser - who appeared on behalf of the 1st Respondent - to argue otherwise.

[24] I take into account further that the question of fairness plays a role. It is clear from a reading of the papers before me, that the Applicant throughout was serious in its resolve and endeavour to prosecute the Appeal against the Arbitrator's award and therefore, the noting of the Appeal, was not frivolously made, without base, merely to delay and frustrate the 1st Respondent's position.

[25] There is also no indication that the evidence contained, in the now tendered affidavit, is shaped 'to relieve the pinch of the shoe', so to speak.

[26] The evidence which the Applicant seeks to place on record is material. Both parties are *ad idem* in this regard. At least the Applicant's tendered exposition, as to why it contends that its Appeal has good prospects of success, has now been placed on a much firmer footing.

[27] To refuse this application, would ultimately also amount to visiting the fault or remissness of the Applicant's legal practitioners on the Applicant. I hesitate to do so.

[28] Ultimately, I will exercise my discretion in favour of the application, however, mainly on the consideration that the affidavit in question will eventually allow the adjudication of the main application upon all the material facts relevant to the issues in dispute there.

[29] Finally I believe that any prejudice to the 1st Respondent is cured by affording the 1st Respondent a further opportunity to respond to the further affidavit which I am about to allow.

[30] In the result, I grant the following relief:

- (a) The Applicant is allowed to file the tendered 'Supplementary Affidavit of Brian Katjaerua', which is hereby admitted onto the record.
- (b) The 1st Respondent is given 14 days from date of this Order to file a further affidavit in reply thereto, should it so chose.

GEIER AJ

ON BEHALF OF THE APPLICANT

ADV. T FRANK SC

ASSISTED BY ADV. T C PHATELA

Instructed by:

HENGARI, KANGUEEHI & KAVENDJII-INC.

ON BEHALF OF THE 1ST RESPONDENT;

ADV. VISSER

Instructed by:

NEDERLOF INC.

ON BEHALF OF THE 2ND RESPONDENT:

NO APPEARANCE