



**LABOUR COURT OF NAMIBIA**

**JUDGMENT**

Case no: LC 03/2012

In the matter between:

**MUNICIPAL COUNCIL OF CITY OF WINDHOEK**

**APPELLANT**

and

**ERNA OCHORUS**

**1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE LABOUR COMMISSIONER**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Municipal Council of City of Windhoek v Ochurus (LC 03/2012) [2012] NAHCMD 3 (04 October 2012)*

**Coram:** Smuts, J

**Heard:** 25 September 2012

**Delivered:** 4 October 2012

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**JUDGMENT**

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SMUTS, J

[1] Although not expressly stated in the notice of motion, this is in essence

an application for the reinstatement of an appeal from an arbitrator to this court.

[2] The need to bring this application arose in the following way. The respondent had referred a dispute to the Labour Commissioner, claiming unfair discrimination on the grounds of ethnicity against the applicant in filling a position which the respondent had applied for. The matter proceeded to arbitration during October 2011 and the hearing was completed on 4 November 2011. The arbitrator handed down an award in favour of the respondent on 16 December 2011.

[3] On 23 December 2011 the applicant filed a notice of appeal against the award, but that appeal has not been prosecuted within the 90 days prescribed in Rule 17(25) of the Rules of this court and is thus deemed to have lapsed. When the applicant filed the notice of appeal it omitted to serve Form 11, attached the rules, simultaneously with the notice of appeal.

[4] The applicant's legal practitioners of record were informed by telefax from the Labour Commissioner's office on 3 February 2012 that the record had been dispatched to the Registrar of this court. In the founding affidavit it is further stated by the applicant's legal practitioners that the firm was informed on 8 February 2012 by the Registrar of this court that the record had been provided and that the applicant's legal practitioners should proceed to paginate and index it. On 13 February 2012 the applicant's legal practitioner attended at the Registrar's office, inspected the record and established that certificate of authenticity by the Labour Commissioner was not on the file. This was pointed out to the arbitrator in question on the very next day. He undertook to provide the necessary certificate on 15 February 2012. The applicant's legal practitioner once again attended at the Registrar to inspect the file and received it on 20 February 2012 and then finalized the indexing and pagination of the record.

[5] The record was then under cover of a letter of 22 February 2012 sent to the deputy sheriff for service upon the respondent. On the same day a professional assistant in the applicant's legal practitioner's firm, Ms Geingos, was instructed to obtain a date for the hearing of the appeal. The professional

assistant in question was informed by the respondent's representative in the arbitration that legal practitioners would represent the respondent in the appeal. It was pointed out to Ms Geingos that the respondent had still not as yet received a copy of the record. Ms Geingos in turn contacted the offices of the deputy sheriff and established that the record had not as yet been served.

[6] On 22 March 2012, the final date for the service of the record and for prosecuting the appeal, Ms Geingos attempted to contact the respondent's legal practitioner of record but was unable to do so. The record was then served upon the respondent on that date. On 26 March 2012 the respondent's legal practitioners received notice from the applicant's legal practitioners to attend at the office of the Registrar for the purpose of obtaining a trial date. The respondent's legal practitioner pointed out that the 90 day period referred to in Rule 17(25) had expired prior to the service of the record and that the appeal had lapsed, given the fact that the request to secure a trial date had occurred after expiry of that 90 day period and objected to the applicant proceeding to obtain a trial date in the circumstances. The respondent's legal practitioner was again approached on 28 March 2012 to agree to the securing of a trial date. But it was correctly pointed out by the respondent's legal practitioner that the extension of time or the reinstatement of an appeal can only be done on application to this court.

[7] It was thus clear to the applicant's legal practitioner already on 29 March 2012 at the latest that an application was necessary in order to seek the reinstatement of the appeal and for condonation for the failure to comply with the rules. Despite this, this application for condonation was only served on 24 April 2012.

[8] In this application, the applicant seeks condonation for its failure to 'serve the notice of appeal on Form 11' and for the failure to prosecute the appeal and for the late filing of the service of the arbitration proceedings. The applicant further sought the leave of this court to serve the record of the proceedings out of time and to prosecute the appeal.

[9] The respondent has opposed this application. The respondent's opposition is of a dual nature. In the first instance, the respondent contends that good cause has not been established in the application and submits that the explanation is inadequate and that the applicant does not enjoy prospects of success by reason of the grounds raised in the notice of appeal which differ from those contained in the argument advanced on behalf of the applicant in the hearing of this application. In the second instance, the respondent denies that the application for condonation was brought without delay after becoming aware of the need to bring it.

[10] The respondent was represented in these proceedings by Mr Boesak who, in a detailed argument referred to the test for condonation in applications of this nature and for the need to bring such applications as soon as possible after the need to do so had been identified. He referred to numerous authorities to this effect emanating from both this court as well as the High Court.

[11] Mr Phatela, who appeared for the applicant, also referred to several authorities and submitted that, although there had been inadequacies in the manner in which the legal practitioners for the applicant had dealt with both the service of the record of proceedings and the steps to set it down as well as the bringing of the application for condonation thereafter, the matter was of considerable importance to the applicant, being a claim for unfair discrimination and that the arbitrator had erred in his determination of the issues in the arbitration. Mr Phatela contended that the conduct of the applicant's legal practitioners, although inadequate, was not of a gross nature and that the court should take into account the degree of non-compliance and the explanation provided for it. In addition to referring to the importance of the case to the applicant, he briefly referred to the applicant's prospects of success and submitted that, taking into account the totality of these circumstances and considerations, condonation should be granted.

[12] I have carefully considered the facts raised in this application as well as the authorities which both counsel have referred to. It is clear to me that the authorities relied upon by respondent entail degrees of non-compliance in

excess of the few days of non-compliance in this matter as opposed to weeks and months which had occurred in the other matters. The degree of non-compliance is an important consideration in applications of this nature. Mr Phatela's concession concerning the inadequacy of steps taken by the applicant's legal practitioners is well placed. But the delay in causing the record to be served timeously and then prosecuting the appeal timeously is of a lesser degree and not of such a nature that it should disentitle the applicant from proceeding with the appeal. I also take into account that the matter itself is of considerable importance to the applicant, raising questions of unfair discrimination in the filling of positions or in promoting employees. I also take into account Mr Phatela's submissions on prospects of success. I further take into account that, although the dispute has been dealt with by a tribunal, being an arbitrator under the Labour Act, Act 11 of 2007, it is of considerable importance to the applicant and has not as yet been ventilated in court.

[13] In all these circumstances, I would in the exercise of my discretion grant condonation to the applicant for the non-compliance referred to in the notice of motion so that the appeal may be reinstated.

[14] The respondent had in opposition to the application submitted that an order of costs should be made against the applicant and that the non-compliance amounted to vexatiousness or frivolousness as contemplated by section 118 of the Labour Act. The respondent's opposition to this application has not in my view been unreasonable. If this matter had proceeded in the High court, the respondent would in my view have been entitled to the costs of opposition to this application. When I raised this issue with Mr Boesak he correctly conceded that the conduct on the part of the applicant's legal practitioners, whilst less than satisfactory, did not amount to frivolousness or vexatiousness. He accepted that the respondent would thus not be entitled to costs. It is thus not further necessary for me to deal with this aspect save to agree with his approach.

[15] The following order is thus made in this application:

1. The appellant's failure to serve the notice of appeal on Form 11 is condoned.
2. The late filing of the record of the arbitration proceedings and failure to timeously prosecute the appeal is condoned.
3. The appellant is granted leave to serve the record of the arbitration proceedings and to prosecute the appeal out of time.

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DF SMUTS

Judge

## APPEARANCES

## APPLICANTS:

Adv TC Phatela

Instructed by Hengari, Kangueehi  
Kavendjii Inc, Windhoek

## RESPONDENT:

Adv AW Boesak

Instructed by Murorua & Associates,  
Windhoek