



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 18/2009

In the matter between:

TELECOM NAMIBIA LIMITED

APPLICANT

and

MICHAEL NANGOLO AND OTHERS

RESPONDENTS

Neutral citation: *Telecom Namibia Limited v Nangolo* (LCA 18/2009 [2012]
NALCMD 4 (05 November 2012))

Coram: DAMASEB, JP

Heard: 24 September 2012

Delivered: 05 November 2012

Flynote: Application for leave to appeal 'dismissal' of condonation application to pursue appeal out of time – Court doubtful if leave required - On assumption it is – leave to appeal refused as Court finding that supreme court will not come to conclusion that discretion abused – prospects of success not decisive.

ORDER

The following order is made:

If I indeed leave to appeal were required, I would refuse it for all of the above reasons.

JUDGMENT

Damaseb, JP:

[1] The applicant, whose application for condonation to pursue an appeal out of time I dismissed on 28 May 2012 comes to me to seek leave to appeal to the supreme court. In the previous proceedings it had sought to note an appeal against an arbitration award of an arbitrator given under section 86 of the Labor Act¹. Appeals lie to the high court in terms of section 89 read with section 117(1)(a)(ii) of the Labour Act. In terms of section 18 of the Supreme Court Act²:

‘(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie

(a) In the case of that court sitting as a court of first instance, whether a full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;

(b) In the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.’

[2] The first question that arises is whether or not leave to appeal is required. In his prefatory remarks, Mr Heathcote SC, for the applicant, commented on whether or not, given that the court ‘dismissed’ the application for condonation as opposed to

¹ No. 11 of 2007

² No. 15 of 1990

'striking' it from the roll, it was necessary to obtain leave. He implied in so submitting that only if the matter were struck was leave required and that in the event it was dismissed, there was a right of appeal to the supreme court as of right. Mr Heathcote referred me to the matter (a criminal case) of *S v Nakale*³. In that case the Chief Justice, writing for the court, held that where on an appeal noted to it, the high court did not consider the merits of the appeal other than in the context of the application for condonation, but only decided and refused the application for condonation for the late noting of the appeal, an appellant was entitled to appeal to the supreme court against the decision refusing condonation, as of right.⁴ Clearly, the Chief Justice meant such right inured in the situation where the high court on account of the order it had made- regardless of language used- had become *functus officio* and could no longer revisit the previous order. I cannot conceive a circumstance where, after mere striking from the roll, there could, even with leave, be an appeal to the supreme court - because in such a circumstance the party whose application is struck has the right to ask the high court to have the matter relooked upon fresh papers. I dismissed the application for condonation and in that way this court had become *functus officio*. Based on the facts before me, I am not persuaded that the dichotomy of 'striking' versus 'dismissal' is a credible one. The applicant cannot pursue the application for condonation in the high court again: The door is closed.

[3] The applicant has however proceeded to pursue the application for leave to appeal on the basis it requires leave. The respondent too appears to accept that the applicant indeed requires leave. I will assume, without deciding, that leave to appeal is required.

[4] As I explained in my judgment against which leave to appeal is now sought, in an application for condonation to pursue an appeal out of time, prospects of success on the merits is not decisive. That is so because there is also the countervailing public interest in the finality of litigation. In any event, I did consider the prospects of success and concluded that there was none on what I defined as the crucial issue

³ 2011 (2) NR 599.

⁴ At 602, para 6.

that fell for determination by the arbitrator. I reasoned that even if I was wrong on that question, I would refuse the condonation application as I considered it palpably lacking in a satisfactory explanation for the delay and that the entire period of the delay was not explained on the standard set by the authorities. My conclusion on that score remains as constant as the northern star. In doing so I exercised a discretion which the supreme court may only fault if I abused my discretion or blundered in the exercise thereof. Have I blundered? The suggestion that comes close to suggesting that I did is embodied in the alleged grounds that:

- (a) I relied for the exercise of the discretion on a factor which was not raised by the parties which, so it is said, were in any event explained in allegations made in another case involving the same parties;
- (b) I disregarded concessions made by the respondent's counsel.

[5] As regards the concessions made by the respondent's counsel, they related to whether or not there was evidence before the arbitrator that all the respondents were parties to the dispute then serving before the arbitrator. First of all, I am not bound by any concession made by counsel on a legal question. Secondly, I did consider that issue at some length and came to the conclusion that it was not fatal. For the avoidance of doubt, I had come to the conclusion that the applicant is entitled to resist enforcement by any person who in its view (as allegedly supported by the records it now says it has and were allegedly submitted to the arbitrator but ignored) had already been paid the very amounts sought to be enforced. I referred to authority in that regard. What it is not entitled to do on the terms of my judgment, is to escape liability to a person falling in the class of the respondents as regards severance and accrued leave pay for the period they had been in the employ of the applicant, as found by the arbitrator. That is the import of my conclusion on the merits. Even if I am wrong on that score and the supreme court came to a different conclusion, I am satisfied, and remain so, that it will not come to the conclusion that I abused my discretion in refusing condonation.

[6] The criticism that I failed to have regard to events in another case in which the applicant sought to protect its interests by resisting execution of the arbitrator's

award, is answered by the rule of practice that it is the duty of an applicant in motion proceedings to specifically refer to and specify the part of a document (or record in other proceedings) on which it relies for its case. No such thing happened in the present case. The high water mark of the allegation is *that* appearing at paragraph 23 of the application for condonation deposed to by Aspara as follows:

'The background to this dispute is clearly set out in the founding affidavit deposed to by Rev. Gertze in the appellant's application to suspend the operation of the award. I am fully acquainted with the contents of his affidavit and confirm the same as true and correct to the best of my knowledge. For the sake of brevity I do not repeat the contents thereof or overburden my affidavit by attaching the reverend's 86 page affidavit. Instead I humbly refer the Honourable Court to his affidavit filed in LC33/09 and pray that the specific portions thereof dealing with the background to this dispute and the appellant's prospects of success, be incorporated into my affidavit as If specifically set out and so incorporated⁵. I further confirm that the application to suspend the operation of the award has been served on all of the respondents and that a copy of Rev. Gertze's affidavit will be made available to this Honourable Court.' (My underlining for emphasis)

[7] It appears that I was expected from the above to conclude that the applicant had not unreasonably delayed launching the application for condonation for the late filing of the appeal. That approach is wrong and does not accord with the practice of our superior courts of record. It was its duty to clearly and unambiguously deal with the entire period the delay occurred.⁶ That was an issue properly before me because it was seeking condonation. I was entitled to comment on that and to refuse the application for condonation if it had not been dealt with to my satisfaction. That is what the authorities cited in my judgment require me to do.

⁵ Note the purpose for which the affidavit in the other proceeding was being incorporated.

⁶ See para 23 of the judgment refusing condonation.

[8] ORDER:

If I indeed leave to appeal were required, I would refuse it for all of the above reasons.

P T Damaseb
Judge-President

APPEARANCES

APPLICANT: Mr Raymond Heathcote, SC, Assisted by Mr
Ramon Maasdorp
Instructed by G F Köpplinger Legal Practitioners

RESPONDENTS: Mr Titus Ipumbu
Of Titus Ipumbu Legal Practitioners