



**CASE NO: LCA 57 /2011
LC 68/2011**

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

PURITY MANGANESE (PTY) LTD

APPELLANT

and

**FABIOLA KATJIVENA
THE LABOUR COMMISSIONER
SAMUEL UUSHONA**

**1st RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

*Neutral citation: Purity Manganese (Pty) Ltd v Katjivena (LCA /2012) [2012]
NALCMD 11 (2012)*

CORAM: SMUTS, J

Heard on: 8 November 2012

Delivered on: 3 December 2012

Flynote: Application for re-enrolment or re-instatement of appeal under s89 of Act 11 of 2007 which had been struck when an application to postpone that appeal had been dismissed. Application dismissed because explanation in support of it was essentially the same which formed the basis of the dismissed postponement application.

ORDER

- (a) The application to re-instate or re-enroll the appeal is refused
- (b) The application to re-instate or re-enroll the review is granted and that application is referred to case management.
- (c) The third respondent's application for condonation for the late filing of a notice setting out the ground of opposition to the appeal is removed from the roll.
- (d) No order is made as to costs.

JUDGMENT

SMUTS, J [1] The applicant in this application applied for the re-instatement or re-enrollment of an appeal against an arbitrator's award as well as the re-instatement or re-enrollment of a review application which related to the same award. Both the appeal and the review were struck from the roll on 27 July 2012. On that date the applicant applied to postpone both the appeal and the review application. The application for postponement was refused with costs in both instances. The appeal and review application were then struck from the roll.

[2] Following those orders, this application was launched on 2 August 2012 and set down for 17 August 2012. It was on the latter date removed from the roll. Opposing papers and a replying affidavit were subsequently filed. The third respondent has also brought an application to condone the late filing of a notice of opposition to the appeal as contemplated in Rule 17(16).

[3] When the matter was called in case management, I indicated to the parties that I would want to hear argument on the question as to whether the application in relation to

the re-instatement or re-enrollment of the appeal was competent, given the basis for the order of 27 July 2012. I thus requested the parties to address me on the effect of the order given on 27 July 2012 in relation to both the appeal and the review application. I expressed the concern in the context of the appeal that I may be *functus officio* in respect of the issues raised in the application to re-instate the appeal. I further sought argument on the question of the effect of the striking of the review application on 27 July 2012.

[4] In order to address these issues, it is necessary for me to refer to the ex tempore judgment given on 27 July 2012. Both the appeal and the review relate to an award of an arbitrator made under s89 of the Labour Act, 11 of 2007. The appeal had been set down for 27 July 2012. Shortly before the hearing of that appeal and on 18 July 2012, I enquired in case management from the representatives of both parties whether the review application could be heard simultaneously with the appeal on 27 July 2012 given the overlap of certain issues and particularly the factual context of both matters. They agreed to that (I pause to point out that the first and second respondents did not oppose either the appeal or the review and should in any event not have been cited in the appeal.)

[5] Because heads of argument had not as yet been filed in the appeal at that time, although the appellant's heads were already due by then, I gave directions concerning the filling of heads in both matters. Both due dates were not met by the appellant. Very shortly before the hearing, the appellant brought an application to postpone both the appeal and the review application. In respect of the appeal, I found that the explanation for the postponement was inadequate compounded by a lack of candour on the part of the deponent to the affidavit in support of the application. I found that the postponement application and the explanation for it did not meet the test articulated by the Supreme Court in the Myburgh Transport matter¹. I accordingly refused the application to postpone the appeal and struck the appeal from the roll.

¹ Myburgh Transport v Botha t/a SA Truck Bodies 1991 NR 170 SC at 174-175

[6] The basis for the current application for re-instatement or re-enrollment of the appeal is essentially the same explanation which was provided in support of the postponement application which was dismissed. As I have already indicated, that application was dismissed because I found that the explanation was inadequate and less than candid. I have accordingly determined that issue and, in the exercise of my discretion, refused the application for postponement on 27 July 2012 on the basis of the inadequate explanation for it and the other unsatisfactory features of that postponement application. It is not open to the applicant to approach this court with essentially the same explanation and seek the re-instatement or re-enrollment of the appeal. After the appeal was struck from the roll when the postponement application was refused, it could not be re-instated or re-enrolled on the same basis which had been found to be inadequate.

[7] In the course of their argument, the parties also made submissions on the prospects of success of the appeal. Given the conclusion, I have reached it would not be necessary to refer to the issue of prospects of success of the appeal. But it would in any event also seem to me that on this leg of the enquiry which would need to be established, the appellant would also face difficulty. Quite apart from the question as to whether it could be said that it was established that the third respondent was negligent, on a question of procedural fairness, the appellant's appeal is at best in my view problematic. I have considered the record of proceedings, including the internal proceedings. The third respondent was found guilty of damage to company property and negligence arising from a motor vehicle accident and dismissal. But was recommended. On an internal appeal, the appeal chairperson overruled the recommendation and recommended re-instatement. After this the employee was summoned by the appellant's Executive Manager and the sanction sought to be changed to dismissal, it does not appear from those proceedings that the third respondent was informed that he was at risk of an increase in sanction to a dismissal. That would in my view need to have been established. It would seem that the appeal may not, on this ground alone, have enjoyed reasonable prospects of success. Because of the conclusion I have reached in the matter, it is not necessary to address this aspect and the merits of the charges any further.

[8] The review application was on 27 July 2012 dealt with on a different footing. I found that the pleadings in that application had not as yet closed. It was thus not ripe for hearing, even though the court papers had also not been paginated or indexed. Nor had heads of argument had been filed in accordance with the directions given to the parties. But it was essentially removed by reason of the fact that it should not have been placed on the roll in the first place because it was not ripe for hearing. This should have been pointed out in case management when it was set down. It would thus be open to the applicant to re-enroll it for case management for the purpose of obtaining a date for hearing if no answering affidavit or further papers are filed.

[9] When this application was heard, it was opposed by Mr Tjitemisa on behalf of the third respondent even though the parties had earlier agreed that it would not be opposed in exchange for non-opposition to the third respondent's application for condonation for the late filling of a notice setting out the grounds of opposition in the appeal and for an answering affidavit in the review application. I indicated at the time that the agreement between the parties would not be binding upon the court, particularly given the basis for the refusal for the postponement application for the appeal which has essentially been repeated in this application.

[10] It follows that the order which I make in this application is that:

- (e) The application to re-instate or re-enroll the appeal is refused
- (f) The application to re-instate or re-enroll the review is granted and that application is referred to case management.
- (g) The third respondent's application for condonation for the late filling of a notice setting out the ground of opposition to the appeal is removed from the roll.
- (h) No order is made as to costs.

DF SMUTS
Judge

PEARANCES

APPLICANT:

RESPONDENT: