REPUBLIC OF NAMIBIA

REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 101/2011

In the matter between:

WITVLEI (PTY) LTD **APPLICANT**

and

LIBONINA NAWA AND 20 OTHERS **RESPONDENTS**

Neutral citation: Witvlei (Pty) Ltd v Nawa & Others (LC 101/2011) [2013] NALCMD 30 (August 2013)

Coram: SMUTS, J

Heard: 19 July 2013

Delivered: 12 August 2013

Flynote: Application for rescission of judgment and condonation for not bringing it within the 14 day period prescribed by rule 16. Reinstatement of an appeal against an arbitrator's award and consequential relief also sought. Applicant failing to provide acceptable or reasonable explanation for non-compliance with rule 16. The applicant also failing to show reasonable prospects of success in the application. The applicant also failing to provide a reasonable

or acceptable explanation for the failure to prosecute the appeal timeously. Application dismissed.

ORDER

That the application is dismissed.

JUDGMENT

SMUTS, J

[1] In this application, the applicant seeks to rescind a judgment and order of this court of 28 June 2012 and for condonation for bringing it out of time. The applicant also applies for certain further substantial relief, in the form of reinstating its appeal against an arbitrator's award and consequential relief referred to after briefly setting out the background to this application.

[2] The 2nd to 19th respondents obtained an arbitration award under s 86 of the Labour Act, 11 of 2007 (the Act) in their favour against the applicant. The award was handed down on 23 August 2010. The applicant noted an appeal against that award on 28 September 2010. It also applied for an order staying the execution of the award pending the appeal. An order to that effect was granted on 12 November 2010. In those proceedings, the applicant undertook to make payment of the amount of the award namely N$194 235, 25 into an interest bearing trust account. That tender was accepted and was referred to in the court order of 12 November 2012.

[3] The applicant's appeal however lapsed on 29 December 2010.

[4] On 12 July 2011 certain of the respondents took steps to enforce the arbitration award, given the lapsing of the appeal. As a result of these steps, the

applicant on 31 August 2011 launched an urgent application (the 2011 application) directed at stopping those steps and seeking the following relief:

- setting aside a writ of execution dated 13 December 2010;
- an order declaring the attachment of the applicant's movable properties on 16 August 2011 null and void;
- setting aside the arbitration award dated 23 August 2010;
- alternatively an order interdicting the respondents from enforcing the writ of execution, pending the finalisation of an application for condonation for the late filling of a review application which the applicant indicated would be filed on or before 9 September 2011.'

[5] That urgent application was set down for hearing on 9 September 2011. It emerged at the hearing of that application that it had not been served on the first and second respondents, the Deputy-Sheriff and the Registrar of the High Court. Certain relief was sought against them. The court indicated that it would not entertain the application for the relief against them in the absence of service upon them. The matter was then removed from the roll at the instance of the applicant.

[6] The deponent to the founding affidavit in that urgent application was a certain Mr S.R. Bezuidenhoudt, the then Acting General Manager of the applicant.

[7] The application was opposed by certain respondents represented by Mr Marcus. They also filed a counter application, seeking an order directing that the applicant pay the sum of N$194 235, 25 to the respondents via the trust account of Mr Marcus. As I have indicated, this sum had been the subject of an undertaking by the applicant to be paid into an interest bearing trust account of the applicant's legal practitioners, pending the finalisation of the appeal. It was a tender made and accepted by the Court in the application to stay the enforcement of the award pending the appeal.

[8] After the urgent application was removed from the roll on 9 September 2011, the applicant took no further steps to prosecute it. Nor was any review application brought by 9 September 2011 or ever since on behalf of the applicant, as was foreshadowed in the urgent application. The respondents represented by Mr Marcus then took steps to set the 2011 application and counter-application down for hearing. The matter was referred to case management and on 4 April 2012 a case management order was given, setting it down for hearing on 28 June 2012.

[9] The applicant's erstwhile legal practitioner however withdrew on the afternoon on 27 June 2012. Prior to their withdrawal, no heads of argument had been filed. Nor had the court file been indexed and paginated. The legal practitioners in question, Tjitemisa & Associates, cited as the 20th respondent in this application, were also not present when the matter was called in court on 28 June 2012. Nor was any representative of the applicant, despite the applicant's name having been called at court.

[10] After posing certain questions to Mr Marcus and hearing brief argument on certain aspects raised by the court, the court on 28 June 2012 proceeded to grant an order in the following terms after giving a brief ex tempore judgment.

'1. That the Applicant's application for the relief set out in paragraphs 2 and 3 of the notice of motion is struck from the roll.

2. That the relief sought in paragraphs 1, 4, 5, 6, 7, 8 and 9 of the notice of motion is hereby dismissed.

3. That the applicant is directed to pay the respondents grouped as 5th Respondent the money in the amount of N$194 235.25 together with interest thereon by not later than 5 July 2012, such payment to be made to the offices of Nixon Marcus Public Law Firm.

4. No order as to costs.'

[11] This application is directed at rescinding that order which was thus given in the absence of the applicant.

[12] The applicant launched this application on 31 August 2012. It firstly seeks condonation for non-compliance with rule 16 relating to the time period within which applications for rescission of judgments or orders of this court are to be brought. The applicant however seeks an order considerably wider than the rescission of this court's judgment and condonation for the late bringing of the application. The applicant also seeks an order reviving the appeal and an order that the enforcement of the arbitration award be stayed and interdicting the 2nd to 19th respondents from proceeding with the enforcement of any writ against the applicant and from taking steps to execute the award against the applicant, pending the final determination of the appeal.

[13] In this rescission application, the applicant heaps much of the blame for the failure to timeously take steps in accordance with the rules upon its erstwhile legal practitioners, Tjitemisa & Associates and its former labour consultant, Mr Otniel Podewiltz. They were both cited as respondents and the application was served upon them. The applicant also sought an order against Tjitemisa & Associates, its erstwhile legal practitioners, directing that they pay the costs of the application on the scale as between an attorney and own client.

[14] Despite the application having been served upon Tjitemisa & Associates, they have not opposed the relief sought against them. Nor have they filed any affidavit dealing with the stinging criticism levelled at them for their handling of the matter.

[15] Even though Tjitemisa & Associates have not opposed the special costs order sought against them, I would have thought that they would have sought to explain their conduct in an affidavit. They however declined to do so.

[16] Mr Podewiltz however filed an affidavit. It turns out that certain of the factual matter raised by the applicant against him was in fact incorrect and that much of the criticism of him was unjustified as the matter was at the time in the hands of the legal practitioners in question.

[17] Although the differing relief sought in this application each has its distinct requirements, the factual matter is interrelated and is to best out together. The rescission application and the application for condonation for its late filing are first dealt with in this context. The application to reinstate the appeal is then referred to.

Rescission and the application for condonation

[18] Rule 16 of the rules of this court provides:

> '(1) Any party to an application or counter-application in which judgment by default is given in terms of rule 7 may apply to the court to rescind or vary such judgment or order provided that the application is made within 14 days after such judgment or order has come to his or her knowledge.
>
> (2) Every such application must be an application as contemplated by rule 6(23), and supported by an affidavit setting out briefly the reasons for the applicant's absence or default, as the case may be, and, where appropriate, the grounds of opposition or defence to the application or counter-application.
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> (3) The court may on the hearing of any such application, unless it is proved that the applicant was in wilful default and if good cause is shown rescind or vary any other judgment or order complained of and may give such directions as to the further conduct of the proceedings as it considers necessary in the interest of all the parties to the proceedings.
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> (4) If such application is dismissed, the judgment or order becomes final.
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> (5) Where rescission or variation of a judgment or order is sought on the ground that it is void from the beginning or was obtained by fraud or mistake, application may be made not later than one year after the applicant first had knowledge of such voidness, fraud or mistake.
>
> (6). . .'

[19] Rule 7, referred to in rule 16(1) deals with the hearing of applications. It provides in rule 7(2) that this court may grant an order against a respondent who

has been served with an application or has delivered a notice of intention to oppose and served with date of hearing but who fails to appear. It also refers in rule 7(3) to the position of an applicant who fails to appear at the hearing. A court may then dismiss the application or make such orders as considers fit. When an applicant or respondent does not appear. These are the provisions which deal with the absence of parties and the power of the courts to make orders where parties fail to appear. It would thus appear that the judgment given on 28 June 2012 was one by default as contemplated by rule 7, given the failure on the part of the applicant or its representative to have appeared at court, despite the fact that the applicant's legal representatives were at least aware of the date of the hearing.

[20] Rule 16 requires that an application of this nature be brought within 14 days after a judgment or order has come to the knowledge of an applicant. The rule further contemplates that unless wilful default on the part of an applicant is established, rescission may be granted if good cause is shown. The term 'good cause' in accordance with well settled principles in turn contemplates establishing two distinct components, each of which must be established.[1] They are firstly a reasonable and acceptable explanation for the absence or default on the part of an applicant and secondly reasonable prospects of success either with an application or with its defence to one.

[21] Although in the context of establishing good cause in applications for condonation with its rules, the Supreme Court has recently reaffirmed that where an explanation for default is so lacking, and the default so flagrant, a court would not need to enquire into the second component of good cause being prospects of success and would dismiss an application for condonation on that basis.[2]

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[1] *Cairn's Executor v Gaarn* 1912 AD 181 at 186; *chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765.

[2] *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* (case SA 23/2011) unreported 26 June 2013.

[22] The applicant in this application first needs to establish good cause to succeed with the condonation application. In order to do so, the applicant would need to provide a reasonable and acceptable explanation for the failure to comply with the 14 day period for bringing the rescission application. It would also need to establish that the rescission application itself enjoys reasonable prospects of success. This in turn would entail establishing a reasonable and acceptable explanation for the default in respect of the rescission application and reasonable prospects of success in the 2011 application which was dismissed and the counter application which was granted. As the applicant also applies for reinstatement of the appeal, its explanation for its default on non-compliance at the various stages will be set out in full and then each component separately analysed referred to in considering whether the applicant has established good cause or failing to comply with the rules relating to the filing of the record of that appeal which had caused it to lapse in December 2010.

The applicant's explanations

[23] Given the protracted proceedings and their context, the applicant's explanation for default not only refers to events shortly before the hearing of 28 June 2012 but goes back to the instruction given to Tjitemisa & Associates after becoming aware of the arbitration award on 2 September 2010. In the founding affidavit, it is stated by the applicant's managing director, Mr F.H. Badenhorst that the 2nd to 19th respondents were suspended from their employment with the applicant in December 2007. The suspension was lifted on 5 March 2009 and they were reinstated and resumed employment. They were not however paid for the period of their suspension. The respondents referred this matter to the office of the Labour Commissioner.

[24] It is apparent from the arbitrator's award that when the matter was referred for conciliation and arbitration on 26 May 2010, the applicant was represented by its then general manager, Mr Beuzuidenhoudt, and the matter became postponed to 3 June 2010. The applicant's representative did not however appear on that date the arbitrator proceeded to determine the matter and made his award on 23 August 2010.

[25] The applicant states that it received notice of the award on 2 September 2010. It timeously noted an appeal against it on 28 September 2010. The applicant also applied for an order staying execution of the award pending the outcome of the appeal. An application to that effect was brought on 4 October 2010 and a rule nisi was granted. On the extended return date of 12 November 2010, the rule was confirmed and the applicant's tender – to pay the sum in question into an interest bearing trust account – was noted in the court order. In the founding affidavit to this application, the applicant's managing director, Mr Badenhorst stated that the tender made was not authorised by the applicant, despite the fact that the deponent to the affidavit in support of the application was its erstwhile general manager. This aspect is dealt with in Mr Podewiltz's affidavit.

[26] In its founding affidavit, the applicant proceeds to refer to the basis upon which it contends that there are reasonable prospects of success in the appeal. These primarily relate to contending that there were irregularities in the arbitration proceedings. I return to these aspects later.

[27] In dealing with the lapsing of the appeal, the applicant states that it was the Labour Commissioner's office which had failed to dispatch the record of proceedings within the 21 day period prescribed by rule 17(7) and that its erstwhile legal representatives, Tjitemisa & Associates, did nothing about that. The applicant also states that neither Mr Podewiltz nor Tjitemisa & Associates made any attempt to alert the applicant of the lapsing of the appal. The applicant refers to a statement by Mr Tjitemisa in correspondence to it stating that his firm was in the process of applying to have the 90 day period extended because there was delay on the part of the office of the Labour Commissioner to provide the record. No such application was ever launched, despite Mr Tjitemisa's letter to this effect to the applicant on 28 January 2011. Indeed the applicant does not refer to any steps taken directed at securing the record, even after becoming aware of the court's order of 28 June 2012. No record has to date been filed, some 3 years after the award.

[28] The applicant's Mr Badenhorst further states that the applicant heard nothing further from Mr Tjitemisa and in April 2011 received a visit from the Deputy-Sheriff with a view to the attachment of property to satisfy the award. (It would appear to have been a visit by a labour inspector at that stage.) This resulted in him addressing a letter Tjitemisa & Associates to 'address the situation' on 7 April 2011. Mr Badenhorst states that he tried to get hold of Mr Tjitemisa to find out the status of the matter and complained that he was only able to communicate with the latter's personal assistant, Ms Zaal, after it became apparent that the award was to be enforced and executed against the applicant.

[29] The next event involving action by the applicant on the issue occurred in August 2011 after the deputy sheriff attempted to attach property to execute the award. Mr Badenhorst took the matter up against with Mr Tjitemisa on 22 August 2011. Mr Tjitemisa informed Mr Badenhorst that he was in the process of filing an urgent application to seek the further stay of the arbitration award. That application was then the application launched on 31 August 2011. The deponent to the founding affidavit was again Mr Bezuidenhoudt, the acting general manager at the time.

[30] The applicant was informed that the matter was to be argued on 9 September 2011. Mr Badenhorst states that he could not attend and sent his personal assistant who, despite what transpired in court when the matter was removed from the roll in no uncertain terms, had inexplicably apparently reported to Mr Badenhorst that the relief sought had been granted. Mr Badenhorst further complains that Tjitemisa & Associates made no attempt to serve the application 'on the employees'. This statement is however incorrect as it was the Deputy-Sheriff and the Registrar who had not been served, as is plainly apparent from the transcript of the proceedings of 9 September 2011 attached to his affidavit.

[31] Mr Badenhorst further states that on 1 December 2011 he received an email 'out of the blue' from Tjitemisa & Associates suggesting that the employees were threatening 'further legal action due to our office not providing

them with a settlement proposal'. This elicited a response from Mr Badenhorst the next day to enquire why a settlement was suggested and requesting a written summary of the state of the matter. Despite this request on 2 December 2011, no written report was provided. Nor was any explanation forthcoming for the suggestion of a settlement. Indeed Mr Badenhorst states that nothing further was heard from Tjitemisa & Associates until 27 June 2012. Mr Badenhorst states that he then received an email (on 27 June 2012), apparently sent late on the previous afternoon, recording that Mr Tjitemisa had tried to contact him on 26 June 2012 but to no avail. It recorded that the matter was to proceed for a case management meeting on 28 June 2012 and sought settlement proposals by 12h00 on 27 June 2012. That email was followed up by a letter from Mr Tjitemisa of 27 June 2012, presumably sent after 12 noon, indicating an intention to withdraw as legal practitioner due to a lack of instructions. Mr Badenhorst promptly responded by insisting upon an immediate withdrawal.

[32] The applicant contends as a consequence of these facts that it was 'constantly kept in the dark about the state of the case' and that its legal representatives had even made fraudulent misrepresentations to it, creating an impression that everything was under control whereas the applicant's position in the matter gradually deteriorated to the point when it became convenient for its practitioners to 'abandon ship'. The applicant further states the matter could have been salvaged by the practitioners doing what was required of them and that the applicant intended to press charges against that firm with the Law Society in due course.

[33] The applicant states that it only on 5 July 2012 received notice of the order of 28 June 2012 when receiving the file contents from Tjitemisa & Associates. Other legal practitioners were already engaged to attend to the matter with an instruction to note an appeal. It transpires from the answering affidavit that an appeal was 'noted' on 5 July 2012. What the applicant fails to disclose is that Mr Marcus responded to it by fax on 10 July 2012, pointing out that the notice was a nullity and correctly pointed out that leave to appeal would first need to be sought and obtained.

[34] It is further stated in the founding affidavit that a consultation was set up with counsel on 24 July 2012 to 'determine the proper wording for the grounds of appeal'. It is then stated that at the consultation it transpired that the applicant would need to seek rescission of the order of 28 June 2012 instead of 'noting' an appeal against it. The applicant further states that at this point in time, the 14 day period to bring a rescission application had thus expired. The applicant however states that it had been under the impression that it would have 30 days to note an appeal. The impression created in the founding affidavit is that the applicant learnt for the first time that its noting of its appeal was inept at the consultation on 24 July 2013, despite Mr Marcus' fax of 10 July.

[35] A further consultation was scheduled for 6 August 2012, because, it is stated, counsel had advised that the applicant should obtain a transcript to the proceedings of 9 September 2011 to determine what had transpired when that application had been heard. Surprisingly, the transcript of proceedings of 28 June 2012 was not sought, despite the attempt to 'note' an appeal. It is further stated that on 6 August 2012, counsel was presented with a lever arch of 400 folios and because of the complexity of the matter, advised that senior counsel also be retained. The founding affidavit was thereafter drafted. It runs into 30 pages and some 200 pages of annexures are attached. The application was served on 31 August 2012.

[36] Had the transcript to the proceedings of 28 June 2012 been obtained by the applicant, it would have been apparent that the court enquired and established that, after the applicant had removed the matter from the roll on 9 September 2011, it did not taken any further action to prosecute that application. The court also noted that the respondents had taken the initiative to set the matter down for hearing and also referred to the case management process which had preceded the date of hearing. The court also enquired and established that, despite the lapsing of the appeal, the applicant had not caused the record of appeal to be filed and had not taken any action to compel the production of the appeal record or brought any application to condone a non-compliance with the rules or extend the period within which the appeal record should be provided. The court also noted that the withdrawal had occurred late

on the previous afternoon and that the applicant's legal practitioner had not filed heads of argument or even attended to indexing and paginating the court file. The court also obtained confirmation that the practitioner had been aware of the date of hearing. The court concluded in the brief ex tempore judgment given that the applicant had been remiss in prosecuting the appeal and the application which served before it.

Contentions

[37] Mr Marcus, who appeared for certain of the respondents, contended that the applicant could not avoid the consequences of its own remissness, even though it stated that it was unaware of the errors perpetrated by its legal representatives and that it was even misled by them.

[38] Mr Marcus submitted that the applicant had taken no particular interest in the case, especially from January 2011 until after the matter was heard on 28 June 2012 when it unduly delayed in bringing its condonation application. Mr Marcus referred to Mr Podewiltz's affidavit and pointed out that the applicant had been informed by Mr Podewiltz, a specialist labour consultant who had been 'appointed' as a human resource officer for the applicant[3] that an appeal is deemed to have lapsed if not prosecuted within 90 days. This he had been advised of in some detail on 26 January 2011 already.

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[3] In the founding affidavit, Mr Badenhorst had disputed that Mr Podewiltz was in the applicant's employ. But Mr Podewiltz pointed out in his affidavit that he was appointed as a 'human resource officer' in the apparent employ of the applicant to get round the regulations concerning the conduct of proceedings before conciliators and arbitrators which precluded representation, except with leave or by agreement. Mr Podewiltz, was then 'appointed' in that capacity so that he could attend to such matters but was free to continue with his consultancy and serve other clients. He was to be paid on an hourly rate for work done. It would seem that 'employment ' contracts of this nature may require investigation by office of the Labour Commissioner to determine whether they are genuine or simulated employment agreements constructed to avoid the consenquences of the regulations. It was thus understandable in this context for Mr Badenhorst in his founding affidavit to have questioned that Mr Podewiltz was a human resource officer of the applicant.

[39] Mr Marcus also referred to the letter from Tjitemisa & Associates which informed the applicant on 28 January 2011 that the firm was busy preparing an application to file for an extension of the 90 day period for the record to be filed. Mr Marcus also referred to the affidavit of Mr Podewiltz in which the latter had stated that the applicant had throughout done nothing to follow up progress and only did so when the labour inspector attempted to enforce the award in April 2011. Mr Podewiltz also pointed to the further period of several months which followed before the applicant again contacted its legal practitioners in August 2011 and further suggested that this contact had again only occurred after the Deputy-Sheriff had attempted to proceed with an attachment.

[40] Mr Marcus also referred to the applicant's lack of knowledge of the August 2011 application which expressly referred to the institution of a review application and the failure to have followed that up. Mr Marcus further referred to Mr Badenhorst's email of 2 December 2011 in which the applicant had requested a report on the matter from Tjitemisa & Associates. This, he pointed out, had followed a request to the applicant directed at securing instructions from it to settle the matter. Despite the fact that a report had not been received, the applicant took no steps to follow the matter up with its legal practitioners. Mr Marcus correctly submitted that it was incumbent to upon it to do so. After that, more than six months passed without any further contact between the applicant and its attorneys.

[41] Despite the fact that the applicant knew on 27 June 2012 that the matter would be called in court on 28 June 2012, albeit being told for case management, the applicant did not urgently appoint other representatives or even send a member of staff to attend in court but instead insisted upon the immediate withdrawal of Tjitemisa & Associates the day before.

[42] In the founding affidavit Mr Badenhorst repeatedly stated that the tender made in court which had formed the subject of the counter application which was granted on 28 June 2012 had been entirely without its instructions. This despite the fact that it had been provided by counsel in court on the instruction of the applicant's then General Manager. This issue is in any event trenchantly

gainsaid by Mr Podewiltz who pointed out that he had acted within his mandate at the time and that the tender was discussed with the erstwhile General Manager of the applicant and that the tender had been made in order to improve the applicant's chances in obtaining a stay of the arbitration award. Mr Podewiltz also stated that he informed the applicant's managing director by mail on 26 January 2011 of the order of court that the money should be paid into an interest bearing trust account. Despite this, the applicant took no steps to countermand that instruction or address that issue until asserting in the founding affidavit that the tender was without instructions. A defence of lack of authority in respect of the tender would not in my view enjoy prospects of success.

[43] The thrust of Mr Strydom's argument, who appeared for the applicant, was that the applicant had been very poorly served by its legal practitioners who had been grosly neglectful in their handling of the matter and that the applicant should not be penalised for this.

[44] Mr Marcus also referred to the delay in bringing the rescission application itself and submitted condonation should not be granted.

[45] The applicant had received the file from Tjitemisa & Associates by 5 July 2012. The application was only filed on 31 August 2012. The instruction to file a notice of appeal to the applicant's current legal practitioners is not explained at all. It is not explained how and upon what basis the newly instructed legal practitioners could have accepted such an instruction in the face of the provisions of s 18 of the High Court Act and not pointed out that it was inept and that leave to appeal should be sought or that a rescission application should be brought and the time limit for doing so. The applicant had after all not even ordered a transcript of the proceedings of 28 June 2012 which would plainly have been required for an appeal. It inexplicably only did so in respect of the proceedings of 9 September 2011 and then only after consulting with counsel on 5 August 2012.

[46] Not only is no explanation given for the notion that a notice of an appeal should be filed, but Mr Marcus' fax of 10 July to the applicant's current legal

practitioners is not disclosed. It was made very clear in that fax that the noting of an appeal was inept. Mr Badenhorst statement that the consultation with counsel scheduled only for 24 July 2012 in the face of that letter – not disclosed and significantly not even referred to in reply – is telling and renders his statement that he laboured under an impression that the applicant had '30 days to appeal' as suspect. This statement would rather appear to have been an afterthought in a bid to explain the delay which had occurred after receiving the court file and knowledge of the order on 5 July 2012 and only first consulting on the issue on 24 July 2012 in the face of the 14 day period in rule 17. The explanation given for this delay is in my view singularly unconvincing and weak.

[47] The further explanation for the delays in preparing the papers would also not in my view be reasonable. It is not explained why counsel had not been properly briefed at the first instance on 24 July 2013 but only provided with a full set of papers after the initial consultation. A delay of some two weeks to 6 August 2013 to schedule a consultation with counsel in the face of an application already out of time is also not at all properly explained. The further delay in preparing the application is likewise not adequately explained. As is pointed out by Mr Marcus, much of the material contained in the application setting out the contentions relating to prospects of success had essentially been lifted from the August 2011 application. There was thus no proper or acceptable explanation quite why the application had taken so long in its preparation.

[48] Mr Marcus accordingly submitted that the applicant had failed to provide a proper and acceptable explanation for the delay in bringing the rescission application and that condonation for the non compliance with rule 16 should not be granted.

[49] Mr Marcus further referred to rule 17 which deals with appeals against an arbitration awards and the procedure for the filing of a record, failing which the appeal is deemed to have lapsed. He submitted that the explanation proffered for not timeously prosecuting the appeal was likewise unacceptable.

[50] Mr Marcus referred to the principle frequently reiterated by the Supreme

Court and followed by this court that applications for condonation and reinstatement of an appeal must be filed without delay and as soon as facts which have given rise for the need to do so have become apparent. He referred to the need for a full, detailed and accurate explanation,[4] for the delay to be provided and to the factors which the Supreme Court has found would be considered in whether to grant condonation. These include[5]

- the extent of the non-compliance with the rules;
- the reasonableness as offered for the non compliance of the rules;
- the bona fides of the application and the prospects of success on the merits of the case;
- the respondents' interest in finality of the judgment;
- the prejudice suffered by the other litigants as a result of non compliance; and
- the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

[51] As was stressed by the Supreme Court in the *Arangies* matter with reference these factors:

'These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been "glaring", "flagrant" and "inexplicable".'

[52] Mr Marcus argued that the delay in this matter amounted to a flagrant breach of the rules of this court and that the approach recently restated by the Supreme Court in *Kleynhans v Chairperson of the Council of the Municipality of Walvis Bay*[6] should apply where the court stated in quoting a judgments to the

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[4] *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010) at par 10.

[5] *Ondjava Construction CC and Others v Haw Retailers t/a Ark trading* 2010 (1) NR 286 SC at par 2. *Arangies t/a Auto Tech Atech v Quick Build* case number SA 25/2010unreported 18 June 2013 par 5. See also *Rally for Democracy and Progress and Others Electoral Commission of Namibia and Others* [2012] NASC 21 (25 October 2012 at par 68.

[6] (2013) NASC 23 (26 June 2013) at par 17.

effect:

'. . . (W)here the non-observance of the rules has been as flagrant and as gross as in the present case, the application should not be granted, whatever the prospects of success might be.'

Analysis of explanations

[53] The Supreme Court has held that where non-compliance with the rules is due to a lack of diligence on the part of a litigant's legal practitioner, a court may still refuse that condonation as it is well established that there is a limit beyond which a party cannot escape the consequences of the negligence or lack of diligence of its legal representatives.[7] This principle would apply where a litigant, knowing that action was required, 'sat passively by without directing a reminder or enquiries from (its) legal practitioner instructed with the matter'[8] and even 'where all the blame can be attributed to the litigant's attorneys'.[9]

[54] The application for reinstatement of the appeal, sought as further relief in this rescission application, has only been launched, as Mr Marcus pointed out, 20 months after the appeal had lapsed. He correctly submitted that the delay in question was considerable.

[55] It is clearly apparent that the legal practitioners in question were very remiss in failing to take steps to see to it that the record was filed and also to properly prosecute the 2011 application and, when they failed to do either, to properly apprise the applicant of the status of the proceedings and also that certain of the respondents were seeking to set down the 2011 application in order to dispose of it. The legal practitioners were afforded the opportunity to place their version before court and declined that invitation even though a special costs order was sought against them. In the absence of any explanation

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[7] *Namib Plains Farming and Tourism CC v Valencia Uranium and Other* 2011 (2) NR 469 (SC) par 25.

[8] Opcit par 25.

[9] *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10B.

from them, it would seem that they were appallingly remiss in the way in which they handled the matter on behalf of the applicant. But the applicant is however not without blame. Its own conduct, as was submitted by Mr Marcus, demonstrated a comprehensive lack of interest in the case. The applicant was only spurred to action sporadically when confronted with steps taken to execute the award at different junctures and displaying indifference and disinterest by inaction in between.

[56] The applicant was not entitled to sit back and do nothing, particularly after being advised that the appeal would lapse and of the need to bring an application to extend the period for the record to be filed and especially after the applicant appeared to become aware of inaction on the part of its own legal representatives when demanding a statement as to where the matter stood on 2 December 2011. The applicant most certainly should have followed the matter up. It would have been apparent to it with the slightest diligence that a review application had not been prepared following the 2011 application, as had been expressly foreshadowed in it. No explanation is given as to why this was never followed up with its legal practitioners.

[57] Months went by on occasion without any follow up on the part of the applicant as to the conduct to the matter from its legal practitioners. It is well settled that an applicant in an application of this nature is required to explain each component of the delay.[10] But it failed to do so in respect of the periods between January and 4 April 2011 and again from then until 22 August 2011, from 9 September to 2 December 2011 and that period following 2 December 2011 until 27 June 2012.

[58] The applicant's Mr Badenhorst also knew that an application to extend the time period for filing the record was required. Yet no enquiry was directed at this either. It was incumbent upon the applicant to do so. Instead, the applicant sat back passively without so much as directing a reminder for the report or an enquiry concerning the further prosecution of the review or the application to

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[10] See *Namib Plains Farming and Tourism* supra at par 24.

extend time periods. The failure to have done so does not excuse the manifold delays in this matter. As was stressed by the Supreme Court in the *Arangies* matter, a weighty and persuasive explanation would be required for a substantial delay of this kind in prosecuting an appeal. The explanation is however unpersuasive and weak.

[59] In respect of the application for rescission, Mr Badenhorst on 2 December 2011 sent a request for a report and directed an enquiry as to why settlement was proposed. When he received no response from the applicant's legal practitioners, he did not direct a single further enquiry or reminder to them in some seven months which then followed, despite the knowledge that further steps were required. Even when the practitioners expressed the intention to withdraw on the eve of a court appearance, no step was taken to secure alternative representation or even send a representative to court in an endeavour to explain the position and ask for time to appoint other lawyers. No explanation is provided for this inaction on the part of the applicant.

[60] Even after the file is received and the applicant became aware of the order (of 28 June 2012) on 5 July 2012, there was a delay until 24 July before a consultation with counsel took place. This delay is not explained except for stating that the applicant gave instructions to note an appeal. A diligent practitioner would have known that the noting of an appeal was inept. Yet this is not explained. I have already referred to the failure to disclose Mr Marcus' fax of 10 July which would have alerted the applicant of the need to take urgent action. A diligent practitioner would also have immediately advised that a rescission application be investigated and alerted the applicant as to the time period contained in rule 17 for the bringing of such an application or to apply for leave to appeal. No explanation is given as to why the former approach was then not adopted especially after the fax of 10 July. Nor is any proper explanation given for the further delay from 24 July to 6 August when the next consultation with counsel was held, except to state that the transcript of the proceedings of 9 September 2011 was sought. No explanation is given as to why a full brief was only provided to counsel on 6 August and not urgently after receipt of the fax of 10 July – some 4 weeks before. This should surely have occurred prior to the

first consultation (which should also have been held far earlier). The explanation given for another 25 ordinary days taken before the application could be brought is also inadequate, particularly when regard is had to the portion relating to prospects of success which, as Mr Marcus correctly points out, was largely lifted from the earlier application.

[61] As far as the reinstating of the appeal is concerned, the applicant was already aware in January 2011of the deadline for filing a record which had not been met and the need to extend the period by way of an application. The applicant was informed that the practitioners were in the process of preparing such an application. Yet no enquiry or reminder was directed to them in that regard. The appeal had lapsed in December 2010. The applicant was apprised of that fact yet failed to follow up steps needed to address the position.

[62] As the Supreme Court stressed in *Namib Plains Farming and Tourism*:[11]

> 'It is trite law that where non-compliance with the rules is time – related, the explanation must cover the entire period.'

[63] There are lengthy periods during which the applicant should have addressed in respect of which no explanation, at all are forthcoming. These periods of inaction at times run into months.

[64] In the *Kleynhans* matter, the Supreme Court cited the following passages in *Aymac CC and Another v Widgerow*[12] with approval:

> '[39] Culpable inactivity or ignorance of the rules by the attorney has in a number of cases been held to be an insufficient ground for the grant of condonation. See *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121C -122C. The principle established by these cases is that the cumulative effect of factors relating to breaches of the rules by the attorney may be such as to

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[11] Supra at par 24.

[12] 2009 (6) SA 433 (W).

render the application for condonation unworthy of consideration, regardless of the merits of the appeal.'

'[40] There is a further reason why the court should not grant condonation or reinstatement in the face of gross breaches of the rules. Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363A where Holmes JA said the following concerning the late filing of a notice of appeal:

"The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment - the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn* 1912 AD 181 at p. 193, in which SOLOMON, J.A., said:

'After all the object of the Rule is to put an end to litigation and to let parties know where they stand.' " '

[65] These considerations particularly apply to labour matters. The importance of achieving finality in labour matters is strongly underpinned by the short time periods in the Act for referring disputes and the short periods within which a review[13] of an arbitrator's award must be brought, and appeal prosecuted[14] and the confining of appeals to questions of law. A speedy resolution of proceedings in the court is expressly contemplated by rule 7(1) which provides:

'The hearing of an application must be conducted in such manner as the court considers most suitable to the clarification of the issues before it and generally to the just handling of proceedings and the court must, so far as it appears appropriate, seek to avoid formality in the proceedings in order to ensure a speedy and fair disposal of the proceedings.'

[66] It follows from the aforegoing that I find that explanation for the late filing of the rescission application to be weak and unpersuasive and thus

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[13] S 89(4).

[14] S 89(3) read with rule 17.

unreasonable and unacceptable.

Prospects of success of rescission application

[67] I turn to the second component of the condonation application which would involve a consideration of prospects of success in the rescission application. That application would likewise require both a reasonable explanation for its default as well as enjoying prospects of success, as I have pointed out. It is however clear to me that the applicant is unable to get over the first hurdle in that two-fold requirement in the rescission application. Despite the laxity and remissness on the part of its erstwhile legal practitioners, the applicant has itself demonstrated a singular lack of diligence in following up the prosecution of the 2011 application (as well as the need to apply to court to extend the period for filing the record in the appeal). The explanation provided for its default in respect of the hearing on 28 June 2012 is likewise lacking, weak and unpersuasive and thus unreasonable and unacceptable. It is indeed so poor that it is in my view glaring and flagrant so as even to preclude a consideration of the merits of the 2011 application. The application for rescission as a consequence is so lacking in prospects of success for this reason alone that it would in my view also not be granted without the need to consider the other component of good cause being prospects of success.

[68] One aspect relating to the prospects of success as a component of the 2011 application and the appeal was heavily relied upon my Mr Strydom during the oral argument of this matter. He submitted that the arbitrator had lacked jurisdiction to hear the dispute in the first place and that the award is a nullity as a consequence. This submission was also contained in the 2011 application. It was pointed out in that application as well as in the founding affidavit that the employees were suspended without pay on 4 December 2007 and the suspension uplifted in March 2009. It was thus contended that the causes of action would have lapsed in December 2008 and that the cause of action had not arisen on 17 April 2009 as alleged in the respondents' referral to the office of the Labour Commissioner.

[69] Mr Strydom contended that the arbitrator lacked jurisdiction to determine a dispute raised outside the time period provided for in the Act. In view of decisions of this court[15] that an arbitrator is not empowered to grant condonation for the referral of a dispute beyond the time periods provided for in s 86(2), Mr Strydom argued an arbitrator would have no jurisdiction to hear such a matter and that the award would be a nullity as consequence. The applicant also contended that the award was a nullity because the arbitrator had made the award in the course of conciliation proceedings and not during an arbitration. This was prominently raised in the 2011 application in support of the relief directed at setting aside the award itself. In the course of oral argument, I raised questions and invited counsel to file additional written argument on these issues subsequently which they both did.

[70] Mr Marcus countered by submitting that the *Louw* decision was incorrect and should not be followed and that the 2011 application in attempting a collateral challenge to the validity of the award (and this application in seeking to perpuate it) amounted to an abuse of process in the context of the appeal which had lapsed and the failure to bring a review of the award timeously. I am unpersuaded that the Louw decision is clearly wrong. On the contrary, I am of the view that it is, with respect, sound. It has also been followed. I turn to the issue of the collateral challenge below.

[71] Mr Marcus further contended that there was in any event no substance in either point. Both had been addressed in the respondents' opposition to the 2011 application. He argued that form over substance would show that the arbitrator in fact engaged in arbitration proceedings after conciliation had not resolved the dispute. He also pointed out that the employees had been suspended in terms of the applicant's disciplinary code in December 2007 but the lifting of the suspensions in March 2009 and reinstatement gave rise then (in March 2009) to a claim for payment during suspension. There is much

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[15] *Nedbank Ltd v Louw* 2011 (1) NR 217 (HC) at par 10; *Namibia Development Corporation v Mwandingi and 2 Others*, (LCA 87/2009) [2012] NALCD 12 (November 2012). See also *Lungameni and Others v Hagen & another* (LC 99/2012) [2013] NAHCMD 15 (27 March 2013).

substance to this latter argument if the point had been properly raised in the arbitration. The cause of action was after all not stated as an unfair suspension but rather unfair labour practice. It was raised after the reinstatement following the lifting of the suspension which was not with full pay and benefits during the period of suspension. The cause of action for payment of wages and benefits may thus only have arisen in March 2009 when payment was refused notwithstanding the unconditional lifting of the suspensions. It may have arisen from the terms of the applicant's disciplinary procedures. What is apparent from the aforegoing is that it is by no means clear that the respondents' cause of action had lapsed more than 12 months before dispute had been referred. On the contrary, that dispute had after all only risen in March 2009 upon non payment and the entitlement to payment for an entire period would then arise even exceeding 12 months. It follows, on the basis of what is contained in the 2011 application and in the founding affidavit to this application, that the applicant had in any event not established that the claims had lapsed and that the arbitrator lacked jurisdiction.

[72] As for the other contention for the award being a nullity, this would amount to a collateral challenge to the award (as well as the contention as to the lapsing of the claims). The question arises as to whether it would be permissible in these proceedings and in the 2011 application to raise these collateral challenges to the award.

[73] In his supplementary note to address this issue Mr Marcus argued that s 89(4) of the Act precluded such a challenge. It requires in peremptory terms without any power for condonation (as opposed the late filing of a notice to appeal) that a party alleging a defect in any arbitration proceedings is to apply to review those proceedings within 30 days of the award being served unless the defect involves corruption. In that event, a period of six weeks from the discovery of the corruption is applicable. In s 89(5), the term defect used in s 89(4) is stated to include where the arbitrator's powers were exceeded.

[74] In the present context the legislature has thus laid down time periods within which an affected party is to raise a defect in applying to set aside an

award. This is in keeping with the common law requiring a party to bring a review within a reasonable time.[16] If a party does not do so, it loses its right to complain of the defect.[17]

[75] In the *National Panasonic* case (in the context of industrial relations), the court described a collateral challenge in these terms:

'A collateral challenge, writes Wade *Administrative Law* 6th ed at 331 will only be allowed "if the right remedy is sought by the right person in the right proceedings". I venture to add to that "and at the right time".'

I respectfully agree with the aptness of this description.

[76] After referring to the need to launch a review within a reasonable time at the pain of losing the right to complain, the court stressed:

'The danger of a contrary approach is, of course, that, if a party to an industrial dispute were not obliged to bring his complaint before the court by way of review, he might raise it at any time and will, if he has any nation of strategy, raise it at the time most inconvenient or damaging to his opponent. This tactic might make it appear as though the court is being drawn into the fray, not to prevent some injustice (unless one were to regard the non-observance of statutory formalities as an injustice), but to add weight to the scale on the one side or the other. I need not emphasise how undesirable such an impression would be. I think, therefore, that the applicant's collateral challenge was made at the wrong time. It was too late. The lock-out was already well under way. It was beginning to bite. Everyone thought it was legal when it started. The applicant itself was getting ready to strike in the belief that what had been done up till then had been validly done it was not under the circumstances desirable for the court to interfere.'

[77] That court reached its conclusion in that matter (not to uphold a collateral challenge) even though the complaint in question went to jurisdiction, which it, with respect, correctly acknowledged this to be a troublesome area. But it held that there was no glaring invalidity in the proceedings or a manifest absence of

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[16] *Kruger v Transnamib (Air Namibia) and Others* 1996 NR 168 (SC); *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia & Others* 1997 NR 129 (HC) (Full Bench).

[17] *Metal and Electrical Workers Union of South Africa v National Panasonic* 1991 (2) SA 527 (C) at 531.

jurisdiction. That approach is, with respect, correct and would in my view apply to the matter at hand. It is for that reason that I have referred to the jurisdiction challenge in greater detail than the other alleged irregularity raised.

[78] The approach of the court in that matter was cited with approval in the well reasoned approach set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others.*[18] The court in *Oudekraal* also further lucidly explained the nature of a collateral challenge in the following way:

> 'It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administration act will be available, in other words, only "if the right remedy is sought by the right person in the right proceedings". Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of the principles of the rule of law.'

[79] The enforcement of an arbitration award under the Act against a party which had been cited and served in those proceedings and where the award is served upon that party shortly after it is made is entirely unlike the position of person threatened with coercive action by a public authority under subordinate legislation or by virtue of an administrative act (where the complainant was not party to it) which is then challenged. The Act expressly provides a remedy for the challenging of the award – by both appeal and review – for an unsuccessful party. A collateral challenge to the award or any enforcement action (such as a writ) pursuant to it would not in my view be the right remedy for an unsuccessful party to invoke as has been sought in the circumstances of this matter as it would fundamentally undermine the provisions of the Act, the finality of judgments and awards and thus the rule of law.

[80] The raising of the applicant's attack upon the award as a collateral

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[18] 2004 (6) SA 222 (SCA) at par 35. See also paras 25 to 27 where the acts even though these consideration would not necessarily arise in this matter. See also *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at par 20. And *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) at 182-184.

challenge in the 2011 application does thus not in my view enjoy prospects of success.

Conclusion

[81] It follows that the condonation application must as a consequence fail for this reason as well.

[82] It also follows that the attempt to reinstate the appeal and the further relief sought in the application must also fail given the flagrant and glaring failure on the part of the applicant to take steps to address the lapsing of the appeal.

[83] As for the costs order sought against the 20th respondent, Tjitemisa & Associates, I pointed out to Mr Strydom that s 118 of the Act precludes this court from making an order for costs against a party unless that party has acted frivolously or vexatioulsy. It contemplates costs orders against parties. It does not contemplate a costs order of the kind sought by the applicant. Mr Strydom correctly accepted that.

[84] I accordingly make the following order:

The application is dismissed.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	JAN Strydom Instructed by Behrens & Pfeiffer
2nd -6th AND 8th -19th RESPONDENTS:	N. Marcus Instructed by Nixon Marcus Public Law Office