

NOT REPORTABLE

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No.: LC 161/2013

In the matter:

MB TRUCK SPARES

APPLICANT

And

MORNE VAN NIEKERK

RESPONDENT

Neutral citation: *MB Truck Spares v van Niekerk* (LC 161/2013) [2014] NALCMD 11
(7 March 2014)

Coram: UNENGU, AJ

Heard: 1 November 2013

Delivered: 7 March 2014

Flynote: Labour Law – Application for condonation of the late noting of an appeal against an arbitrator award dismissed – Court not in a position to decide whether or not the arbitrator, on the facts placed before her, was wrong or right as the record of proceedings in the arbitration proceedings not provided – Application dismissed.

Summary: The application for condonation of the late noting of an appeal against the arbitrator's award has been dismissed due to the failure of the applicant to provide a record of proceedings in the arbitration proceedings. The Court not placed in a position to assess whether or not on the facts placed before her, the arbitrator came to a wrong or correct conclusion.

ORDER

1. The application is dismissed.
2. No order as to costs made.

JUDGMENT

UNENGU, AJ: [1] On 27 May 2013, the applicant approached this Court on an urgent basis seeking an order to stay the execution of an award issued by the arbitrator on 22 April 2013, in favour of the respondent pending the outcome of the appeal the applicant was lodging.

[2] That application was dismissed¹ as a result of a defective notice of appeal. The application did not meet the requirements in subrule (3) of Rule 17 which provides that an appeal against an arbitration award in terms of section 89 of the Labour Act², must be noted in terms of the rules relating to the conduct of Conciliation and Arbitration before the Commissioner published in the Government Notice No 262 of October 2008 (the conciliation and arbitration rules). The applicant in the first application did not deliver Form LC 41 simultaneously with the completed Form 11 to the Registrar, the Commissioner and to the respondent.

[3] Thereafter, the applicant, again on an urgent basis returned to this Court seeking an order condoning and dispensing the non-compliance with rules of Court relating to the forms and service of pleadings and asked the Court to hear the

¹ Case No: LC 72/2013, unreported delivered on 20 June 2013

² Act 11 of 2007

application as a matter of urgency. The applicant, further asked that condonation be granted for failure to deliver Form LC 41 together with Form 11 to the interested parties as well as to the Registrar and the Commissioner, as contemplated in Rule 17(3).

[4] The applicant also asked for the re-instatement of the still born appeal noted in the first application which application was dismissed for reasons already alluded to earlier in this judgment. Lastly, the applicant also prayed for the stay of the execution of the arbitrator's award pending the outcome of this appeal and offered to pay the amount awarded in favour of the respondent plus interest into the trust account of the legal practitioner for the respondent, which amount of money not to be paid out to the respondent until the appeal has been resolved.

[5] After some heated arguments from counsel, it was resolved to delete the relief sought in prayer 3 of the amended notice of motion; to proceed with the hearing of the application on the points raised by the respondent as well as the issue of condonation.

[6] On the first point *in limine* taken by the respondent that the application is not urgent because the delay was caused by the applicant self, therefore, that I must dismiss the application, I disagree. The first application was brought within the prescribed period of 30 days from date of service of the award on the applicant. The only fault with that application was that the applicant did not deliver Form LC 41 simultaneously with Form 11 as required by the rules. Since then, the applicant did not waste time unreasonably to seek redress from the Court.

[7] The respondent also took issue with the non-compliance with the rules of the Court by the applicant. I agree. Litigants, in particular if represented by a legal practitioner, should know that the rules of the Court are an important element in the machinery of justice. Any failure to observe such rules can lead not only to the inconvenience of immediate litigants of the courts but also to the inconvenience of other litigants whose cases are delayed thereby³.

[8] However, in order for the Court to refuse condonation for the non-compliance with the rules, the Court must be satisfied that such non-compliance with the rules

³ Swanepoel v Marais and others 1992 NR at 2J – 3A

was as a result of a flagrant non-compliance with the rules of the Court. A breach which demonstrates a glaring and inexplicable disregard for the process of the Court⁴, which the applicant is innocent of.

[9] In this application, one cannot say that by not delivering Form LC 41 the same time with the completed Form 11, is a breach which demonstrates a glaring and inexplicable disregard for the processes of the Court, as many litigants of this Court were guilty of same but still allowed, on good cause shown, and upon compliance with the rules to litigate. In the instant matter, there is nothing to blame for on the part of either the applicant self or its legal practitioners. All steps taken have been explained in the founding affidavit and the explanation given is acceptable to me.

[10] Next, is the second point *in limine* raised by the respondent. This point deals with the issue that the appeal is not on questions of law alone. This point ties in with the question of prospects of success on appeal. The Court will refuse to exercise its discretion in favour of the applicant, i.e. to grant condonation for the late filing of Form LC 41 should it find that there are no prospects of success on appeal. There will be no point of granting condonation if there are no prospects of success on appeal⁵.

[11] As indicated above, the applicant may appeal against an arbitrator's award on questions of law alone⁶. Should the Court find that the applicant (appellant) is not appealing on questions of law alone, no condonation for the late noting of the appeal will be granted because there is no prospects of success on appeal. No appeal lies against an arbitrator's award on questions of facts, even if the Labour Court, on the same facts, would come to a different conclusion.

[12] The background of the matter is as follows: The respondent was in the employment of the applicant. On 11 September 2012, during office hours, a scuffle of words broke out between the respondent and the owner of the applicant during which derogatory words were used against the respondent. Aggrieved by the manner in which he was spoken to by his boss, the respondent left the workplace after being told to go if he did not approve of the manner he was spoken to.

⁴ Tonata Shiimi v Namzim Newspaper (Pty) Ltd Case LCA 02/2011 (unreported) delivered on 28 May 2012

⁵ Melane v Santam Insurance Co Ltd 1762(4) SA 531 (A) 532 D-F a case cited by Damaseb, JP in Tonata Shiimi case above

⁶ Section 89(1)(a) of the Labour Act, 11 of 2007

[13] On 12 September 2012, which is the following day, the respondent, at 09h00 returned to his work premises but was told to go back home and to come back at 11h00. When he came back at 11h00, the respondent was offered to sign a resignation letter which he refused to do. Thereafter, correspondence were exchanged between the parties but without resolve.

[14] The upshot of that is that the dispute was referred for conciliation and arbitration to the Labour Commissioner's Office, who then appointed Meriam K Nicodemus as arbitrator in the matter. On the 19th April 2013, the arbitrator issued her award in favour of the respondent which reads as follows:

'AWARD

[125] Having found that the dismissal of the applicant was unfair, I therefore ordered that the respondent pay the applicant five (5) months' salary as compensation. The salary rate of the application was N\$22 496.29 per month.

[126] Total amount to be paid to the applicant is as follows **N\$112 481.45.**

[127] The above amount must be paid on or before 3 May 2013 and proof of payment must be sent to the Office of the Labour Commissioner.

[128] No order as to cost is made.

[129] This award is final and binding on both parties hereto and it can be filed by either party with the Labour Court in accordance with Section 87 of Labour Act (Act No. 11 of 2007).

Dated at Windhoek this 19th day of April 2013.

Signed

Meriam K Nicodemus

Arbitrator'

[15] The applicant now wants to appeal against the above arbitral award issued in favour of the respondent, on the grounds, the applicant is alleging being on questions of law alone. The respondent on the other hand, has put the applicant's grounds in issue and is alleging that the arbitrator's award is based on factual conclusions. Therefore, for this Court to assess and resolve the problem at hand,

needs a record of proceedings which took place before the arbitrator to look at the evidence presented before her to be in a position to determine whether or not the finding of fact made by the arbitrator is one which no court could reasonably have made or that the finding in question was so vitiated by a lack of reason to be tantamount to no finding at all⁷.

[16] The record of proceedings held in the arbitration is very crucial in this application, therefore, in absence thereof, this Court is not in a position to decide the issue of prospects of success on appeal for condonation of the late noting of the appeal (non-compliance of the Rules of the Court) to be granted or not. Therefore, for the reasons stated above, the second point *in limine* by the respondent is upheld and the application is dismissed.

Order:

1. The application is dismissed.
2. No order as to costs made.

PE Unengu
Acting

⁷ Nampower v Nantinda Case LC 38/2008 unreported 22/03/2012

APPEARANCE

For the applicant:

Adv C Mouton

Instr. by Mueller Legal Practitioners

For the first respondent:

Mr J Boltman

Of GF Köpplinger Legal Practitioners