CASE NO.: CA 73/2001

SUMMARY

JOHN PLATT versus THE STATE

HANNAH, J. *et* SILUNGWE, J.

2005/06/08

CONDONATION - Non-compliance with Rules of Court - Failure to file heads of argument and to prosecute appeal timeously; and delay in applying for condonation – Condonation application – Condonation not to be had merely for the asking – Full and accurate account of causes of delay and effect thereof to be furnished to enable Court to understand reasons for non-compliance with Rules of Court and assess responsibility – Period of 13 months of inactivity by legal representative and applicant unexplained - There is limit beyond which litigant cannot escape results of his attorney's lack of diligence or the sufficiency or absence of explanation – Hence, litigant cannot legitimately claim that he should be exonerated from all blame for failure to prosecute appeal timeously and for delay in approaching Court for condonation – No good cause shown to justify Court in granting indulgence sought - Though merits of appeal not argued, on face of evidence and judgment of court *a quo*, one cannot reasonably surmise that good cause exists for applicant's success on appeal – Condonation refused.

CASE NO.: CA 73/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHN PLATT
APPLICANT

and

THE STATE **1ST RESPONDENT**

THE REGISTRAR OF THE HIGH COURT **2ND RESPONDENT**

CORAM: HANNAH, J. *et* SILUNGWE, J.

Heard on: 2005.04.18

Delivered on: 2005.06.08

APPEAL JUDGMENT

SILUNGWE, J.: This is an application for condonation wherein the applicant prays for an order in, essentially, the following terms:

> "1. condoning the applicant's non-compliance with the Rules of the Court and more specifically:

(a) the failure of the applicant and/or of the then legal representatives of the applicant to file heads of argument; and

(b) the failure of the applicant and/or the then applicant's legal practitioner of record to appear before the Court on 3rd June 2002;

2. placing the applicant's appeal filed under case number CA 73/2001 on the roll and allowing same to be heard."

The applicant and the respondents are represented by Mr Botes and Ms Verhoef, respectively.

A brief background of this matter is that the applicant and his co-accused, James Kashume, were, after trial in the Regional Court held in Windhoek, on a charge of theft of a motor vehicle, both convicted as charged and sentenced to a term of six years imprisonment two years of which were conditionally suspended. This occurred on November 8, 2000. Two days later, on November 10, 2000, the applicant and James Kashume (both of whom had been represented at the trial) duly noted their appeals. They were then admitted to bail (pending the hearing of the appeal on June 3. 2002). This application solely concerns the applicant.

It is common cause that, although the applicant's legal representative had been duly served with a notice of hearing of the appeal, neither he

nor the applicant was present in Court when the case was called up for hearing in the forenoon of June 3, 2002, and no heads of argument had been filed on behalf of the applicant. The appeal was then stood down until 14h15 on that day. On resumption, the applicant's then legal representative of record appeared, confirmed receipt of the notice of set down but regretted, not only his non-appearance earlier that day but also his failure to file heads of argument in terms of the Rules of the Court, both of which were attributed to an alleged incomplete record. That lame excuse was not accepted and the appeal was consequently struck from the roll.

In paragraphs 11, 12 and 13 of his affidavit in support of this application, the applicant deposes as follows:

> "11. during or about the end of August 2003, I received information that my appeal apparently was unsuccessful and that I have to start to serve the sentence imposed;
>
> 12. I, to say the least, was utterly surprised, shocked and dismayed as I have received no notification of whatever nature from my then legal practitioners of record that:
>
> (a) the appeal had been set down for hearing;
> (b) the appeal had been heard;
> (c) the appeal had been dismissed resulting therein that I have to serve the sentence imposed;

13. on receipt of the information I immediately went to Mr Hinda as to enquire from him what the true state of affairs are."

The foregoing quotation serves to show that during the period June 3, 2002 (when the appeal was removed from the roll) and August 2003, the applicant was in the dark as to what had become of his appeal. It is not in dispute that prior to June 3, 2002, the applicant had contacted his legal representative to enquire about the appeal and that he was informed that the record of the proceedings was incomplete, adding that the appeal could only be heard after a complete record had been received. It is apparent from Mr Andreas Potgieter's affidavit (deposed to on behalf of the respondent) that the complete record became available on March 18, 2002, in consequence of which the respondent was in a position to file its heads of argument on May 29, 2002.

Besides Mr Potgieter's affidavit, whose significance is essentially limited to the availability of the complete record prior to the set down of the appeal, the applicant's affidavit is uncontested.

Subsequently, the applicant obtained the services of another attorney who briefed Mr Botes to argue the matter in Court. The applicant's heads of argument have since been filed out of time. The gist of Mr Botes argument is that, even if one were to attribute negligence to the applicant's erstwhile legal representative, there is nothing to show that

the applicant was personally negligent in the prosecution of the appeal. Hence, Mr Botes continues, the negligence of the applicant's legal representative cannot be attributed to him.

Ms Verhoef, however, contends that, on the authority of *Salooje & Another NN.O v Minister of Community Development,* 1965 (2) SA 135 AD at 141 C-E, the negligence of the applicant's former legal representative reached such a degree of culpability as to debar the applicant from the relief that he seeks. In the alternative, it is argued that the applicant ought not be granted condonation as he himself is partly to blame for the non-compliance with the Rules of the Court and the delay in the prosecution of his appeal. Further, it is stated that the applicant did not take a keen and active interest in the prosecution of the appeal as he neither kept himself abreast with relevant developments (after June 3, 2002) nor took any steps to spur on his legal representative. Particular attention is drawn to what Ms Verhoef refers to as an "unexplained time period" between June 3, 2002 and August 2003 – a period of more than one (1) year - during which it must have become obvious to the applicant– a former inspector in the Namibian Police Force - that there was a protracted delay in the prosecution of his appeal. It is contended that, despite this realisation, the applicant did nothing and sat passively by, without directing any reminder or enquiry to his legal practitioner until August 2003.

With regard to the applicant's non-compliance with the Rules of the Court on June 3, 2002, the applicant's unchallenged averment in his founding affidavit shows that he was not aware of the set down, as this had not been communicated to him by his then legal representative. That legal representative was not approached by the applicant for a confirmatory affidavit as this, according to Mr Botes, was not necessary.

Turning to the applicant's failure to file heads of argument or to file them timeously, that, on the facts, is solely attributable to his then legal representative. Hence, the dilatoriness of the erstwhile legal representative, up to June 3, 2002, cannot, in the circumstances, be visited on the applicant: *S v Mohlathe* 2000 (2) SACR 530 at 536h-i.

The critical question to which I now turn is this: what role, if any, did the applicant's legal representative and/or the applicant himself play in the prosecution of the appeal during the period June 3, 2002 and August 2003? As Ms Verhoef, properly argues, that period remains unexplained by the applicant. It is apparent from the applicant's founding affidavit that, during the period in question, neither he nor his (then) legal representative played any active role whatsoever, or, in

the alternative, played any meaningful role towards the prosecution of this matter.

In *Mbutuma v Xhosa Development Corporation Ltd,* 1978 (1) SA 681, the Appellate Division said at 684G-H:

> "I come now to the question whether sufficient cause has been shown to justify the Court in granting the indulgence sought. In this petition the applicant states that he at all times intended pursuing his appeal to this Court; the matter, he says, is of importance to him, his standing as a businessman has been adversely affected and all his assets have been frozen. He also avers, in effect, that he is in no way personally at fault in regard to the failure to note and prosecute the appeal timeously and the delay in applying for condonation. That the predicament in which the applicant finds himself is due mainly to the deplorable inefficiency and dilatoriness of his attorney is apparent from the facts set out above. The attorney has not given any satisfactory or acceptable explanation for the irresponsible manner in which he handled the appeal."

The Appellate Division continued at 685E-G:

> "The next question is whether the Court should penalise the applicant for the conduct of his attorney. In this regard it is necessary to draw attention to what was said in *Salooje & Another, NN.O. v Minister of Community Development,* 1965 (2) SA 135 (A. D.) at p. 141, namely that, if an applicant for condonation 'relies upon the ineptitude or remissness of his own attorney, he should explain that none of it is to be imputed to himself.' In my view, the applicant cannot legitimately

> claim that he should be exonerated from all blame for the delay in this instance. He has not given a satisfactory account of the interest that he took in regard to the progress of his appeal and the application for condonation. In this respect his petition is, in my view, lacking in candour."

It further continued at 686C-E:

> "To sum up in this respect, on the evidence before the Court I am satisfied that, although the applicant was aware in August 1975 that the prosecution of his appeal had already been delayed for about eight months, as a result of his attorney's carelessness and inefficiency, he nevertheless allowed the matter to drag on for a further period of seven or eight months before doing anything about it. In my judgment, it cannot be said that the applicant was without blame, for the delay in approaching the Court for condonation must, in the circumstances, be attributed not only to his attorney's remissness and ineptitude, but also to his own difference and lack of concern."

In a somewhat similar vein, the Supreme Court remarked in *Uitenhage Transnational Local Council v South African Revenue Service,* 2004 (1) SA 292 at 297 paragraph (H-J):

> "One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite

> knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

I fully endorse the views expressed in the precending cases. In the present matter, it is clear to me that the applicant's averments lack candour with particular reference, not only to the false impression he creates, namely: that non-compliance with the Rules of the Court was due to the alleged incompleteness of the appeal record, but also to what seems to be a deliberate attempt to gloss over the inordinate period of inactivity on his part, not to mention that of his then legal representative. The inactivity stretched over a period of at least thirteen months. It is self-evident that the applicant has given no account whatsoever of the interest that he took in regard to the progress of his appeal and the application for condonation during the period aforesaid. Hence, he cannot legitimately claim that he should be exonerated from all the blame for failure to prosecute the appeal timeously and the delay in approaching this Court for condonation. As the Appellate Division aptly remarked in *Salooje & Another NN.O. v Minister of Community Development, supra,* at 141 C (per Steyn, CJ.,

with Oglive Thompson, Holmes and Wessels, JJA, and van Wissen AJA concurring) which remarks were confirmed by the Supreme Court in *S v Mohlathe, supra,* at 536 e-f:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity."

It is thus apparent, *in casu,* that no good cause has been shown to justify the Court in granting the indulgence sought.

Mr Botes submits that the merits of the case play an important role, even in the face of gross negligence on the applicant's legal representative; and that there are, in this case, good prospects of the applicant's success on appeal. He thus urges the Court to exercise its widest discretion by allowing the appeal to proceed on the merits.

Although the merits of the appeal have so far not been canvassed, it does not seem to me that, on the face of the evidence adduced before the court a *quo* and the judgment, one can reasonably surmise that

there are good prospects of the applicant's success on appeal. Hence, Mr Botes' submission on the point at issue cuts no ice with me.

In my view, this application should be dismissed on account of the grossly inordinate and indefensible delay for which the applicant and his former legal representative were responsible.

In the result, the following order is made:

1. the application for condonation is refused;

2. the applicant's bail pending appeal is cancelled.

Further, as the applicant's "co-appellant" James Kashume, has remained silent ever since the appeal was struck from the roll on June 3, 2002, his bail pending appeal is similarly cancelled.

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SILUNGWE, J.

I agree

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HANNAH, J.

ON BEHALF OF THE APPLICANT: **Adv. L. C. Botes**

Instructed By: **Dr Weder, Kruger & Hartmann**

ON BEHALF OF THE RESPONDENTS: **Ms A. T. Verhoef**

Instructed By: **Office of the Prosecutor-General**