SUMMARY

CASE NO.: CA 68/2007

ALEXIS PIETERSEN-DIERGAARDT **Appellant**

and

PIETER HENDRICK FISCHER **Respondent**

SILUNGWE, AJ *et* **MANYARARA, AJ**

11/04/2008

CIVIL PROCEDURE - Rule 54 of High Court Rules – Appeal from Magistrate's Court – Application for condonation of failure to prosecute appeal within 60 days and for re-instatement of the appeal – Factors to be taken into account – Court finding that no wilful delay occurred and that there were prospects of success on appeal – Application allowed.

CASE NO.: CA 68/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALEXIS PIETERSEN-DIERGAARDT **Appellant**

and

PIETER HENDRICK FISCHER **Respondent**

CORAM: **SILUNGWE, AJ** *et* **MANYARARA, AJ**

Heard on: 2007.11.12

Delivered on: 2008.04.11

JUDGMENT:

MANYARARA AJ: [1] This is an application for condonation for non compliance with Rule 54 of the High Court Rules and re-instatement of the appeal. The appeal is against a judgment of the magistrate's court at Rehoboth, by which the magistrate allowed claims by the respondent against the appellant, for damages for: (a) defamation, and (b) malicious prosecution,

in a total amount of N$20 000. The appellant is represented by Mr. Marcus of the Government Attorney's Office and the respondent by Mr. Obbes.

[2] Mr. Obbes has raised *in limine* breaches by the appellant of the following provisions:

(1) Rule 54(1) which provides that an appeal against the decision of a magistrate in a civil matter shall be prosecuted within 60 days, failing which the appeal shall be deemed to have lapsed;

(2) Rule 54(4)(a) which requires the appellant, within 40 days of noting the appeal, to apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal;

(3) Rule 54(7)(a) which requires the appellant, simultaneously with the lodging of the application for a date for the hearing of the appeal, to lodge with the registrar 2 copies of the record; and

(4) Rule 54(9) which requires the appellant, not less that 15 days before the appeal is heard, to deliver one copy of a concise and succinct statement of the main points (without elaboration) which he or she intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point.

[3] The founding affidavit was deposed by the appellant and Mr. Marcus filed a confirmatory affidavit. The affidavit sets out the sequence of events in this matter as follows:

[4] The judgment appealed against was delivered on 12 December 2006, and on 14 December 2007, Mr. Marcus wrote to the clerk of the magistrate's court requesting a transcript of the proceedings to enable him to prepare a notice of appeal. He was informed that the record had not yet been transcribed. So, by letter dated 9 January 2007, he requested the tapes of the proceedings in order to personally submit them to the transcribers (CompuNeeds Namibia).

[5] Mr. Marcus noted the appeal on 17 January 2007 without the aid of the record which he subsequently received on 30 April 2007. On 11 May 2007, he applied to the registrar for the assignment of a date for the hearing and simultaneously lodged two of the four copies of the record which he had received. He did not realize at the time that the only copy of the record which had been proof read was one of the two copies he retained, while the rest had not been proof read.

[6] The request for a hearing date was way out of the 60 day limit prescribed by subrule (1) for prosecution of the appeal and, by noting the appeal on 17 January 2007, the appellant also found herself about 6 days outside the 40 day limit prescribed by subrule (4)(a). See *Hall v Van Tonder &*

Another 1980 (1) SA 908 (C), referred to in *M C Lobert v H J Bollinger* CASE NO: CA 148/2004 (not reported).

[7] It seems that there was a long standing practice that usually the clerk of court would have delivered copies of the record by the time that the appellant applies for a date of hearing. If the application is made without lodging the record, the registrar cannot allocate a hearing date. See *Lobert*. The practice, though not provided for by the Rules, had not been observed in this case. Be that as it may, when Mr. Marcus received no response to his written request for a hearing date, he pursued the request by telephone and the registrar actually allocated a hearing date to him telephonically.

[8] Matters came to a head on 29 October 2007 when Mr. Marcus received a letter from the respondent's attorney, dated 14 August 2007, setting out certain defects in the appeal and also inquiring when the appellant's heads of argument would be made available to them. He immediately attended to correcting the record and filing the corrected version, followed by an application for condonation and re-instatement of the appeal. He also requested the respondent's legal practitioners to agree to a postponement with the appellant to pay the wasted costs.

[9] The appellant concedes all the breaches raised by Mr. Obbes and submits that it is precisely in view thereof that the application for condonation and re-instatement of the appeal was made. I respectfully suggest that this feature distinguishes the present appeal from the matter

dealt with in the *Lobert* case in which the point was raised starkly that the applicant had *not* brought an application for condonation for non-compliance with, or an application for re-instatement of, the appeal and the court struck the application from the roll on the basis that, in any event, the appeal had no prospects of success.

[10] Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa* 4th Ed p898, quotes with approval the judgment in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), in which Holmes JA (four other Judges of Appeal concurring) enumerated "[a]mong the facts usually relevant (to the grant of condonation) the degree of lateness, the explanation for it, the prospects of success and the importance of the case."

Holmes JA continues at 532D-F as follows:

> *"Ordinarily these facts are interrelated: they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not so strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects in the affidavits. I think that all the foregoing clearly emerge from decisions of this court and therefore I need not add to the evergrowing burden of annotations by citing the cases."*

[11] It is my view that this Court is entitled to entertain the present application on the principles thus enunciated and the degree of lateness in the present matter must be assessed against the background of the events averred in the founding affidavit. This is that Mr. Marcus had followed up his request of 11 May 2007 for a hearing date with another letter dated 12 June 2007: when no response was again received by 11 July 2007, he had telephoned the registrar and the registrar had wrongly provided him with an appeal date telephonically and a notice of set down was filed on 2 August 2007. Mr. Marcus had then gone on leave and, upon his return, he was inundated with work and scheduled to appear in the High Court and Supreme Court in cases which raised complex legal issues requiring extensive preparation. In addition, he had to attend to other administrative duties and supervisory functions in the office, associated with his position, at a time when the office was experiencing a staff shortage due to resignations and the absence of two fairly senior officers on one year's study leave. The confirmatory affidavit filed by Mr. Marcus concluded as follows:

> *"My omissions in this regard are regretted and I submit that the appellant should not be penalized for it. I respectfully ask that the non compliance with the rules be condoned and that the appeal be re-instated."*

[12] Herbstein & Van Winsen, *op cit*, at p899-900 enunciates the principle to be applied as follows:

> *"Where the default is due to the negligence of the applicant's attorney, that does not per se disentitle the applicant from obtaining relief. The court will consider all the circumstances of the case and will not lay down that a certain degree of negligence will*

preclude the granting of relief, whereas another degree will not. Thus where the court came to the conclusion that a delay in filing the record was due entirely to the neglect of the applicant's attorney, it was held that the attorney's neglect would not, in the circumstances of the case, debar the applicant, who was in no way himself to blame, from relief. (Regal v African Superslate (Pty) Ltd 1962 (3) SA 18 (A) at 23C-D)."

[13] The appellant for her part addressed the point directly as follows:

"I wish to state at the outset that I always intended to prosecute this appeal, as I am of the strong belief that the judgment of the Court a quo and its concomitant order against me to pay damages in the amount of N$20 000, including costs, for actions that rose out of the execution of my official duties was wrong and there are reasonable prospects of both the judgment and the order being set aside on appeal.

Despite my expressed intention to prosecute this appeal my legal representative, who I instructed to conduct the appeal process on my behalf, partially due to an overload of work and partially due to professional oversight, unfortunately failed to timeously take the necessary steps as required by Rule 54."

[14] It is my respectful view that the averments bring this matter squarely within the principles enunciated above by Herbstein & Van Winsen, *op cit.* Therefore, on this basis I would grant condonation for non-compliance with the Rules of Court.

[15] I also believe that the case has reasonable prospects of success on appeal.

[16] The first claim is for defamation arising from a report (also referred to as a letter) which the appellant addressed to the Permanent Secretary of the Ministry of Justice - on enquiry from him - and addressed to him.

[17] The first element of defamation is publication of defamatory matter and Neethling *et al* Law of Delict 5th Ed (translated and edited byJC Knobel) para 3.2.2.1 makes the following categorical statement:

> *"Since the good name, respect or status which a person enjoys in society relates to the opinion of others concerning him, and defamation consists in the infringement of his good name,* ***it is self evident that defamation will arise only if the defamatory statement or behaviour has been published or disclosed to a third person*** *(other than the plaintiff himself)."* Emphasis added.

Accordingly, publication must be proved unless it is admitted.

[18] In *casu* publication of the report was not denied in the pleadings but, in evidence, neither the plaintiff nor the defendant could say if the report ever reached the Permanent Secretary. Taking his cue therefrom, Mr. Marcus, relying on South African authorities, submitted that, in the circumstances, "the court should have determined the issue of publication by having regard to the facts as they emerged during the trial i.e. that there had been no publication to the Permanent Secretary." Nonetheless, the magistrate held that the parties were bound by their pleadings and found that publication was made.

[19] Mr. Marcus also cited *Marais v Haulyondjaba* 1993 NR 171 (Hc) where it was established that the matter published was defamatory and that publication was made. The defence was qualified privilege and the issue was

whether the publication was lawful. The head note of the report summarised the outcome as follows:

> *"Held, further, that such privileged occasion would exist if it were either communicated in the discharge of a duty or the exercise of a right or the furtherance of a legitimate interest and communicated to somebody who had a corresponding right or duty or legitimate interest to receive the communication: if such a qualified privilege were established or apparent from the proved facts, the publication was lawful, notwithstanding that it was defamatory and/or injurious."*

Therefore, I believe that the point is not settled and requires clarification by the Supreme Court.

[20] In casu the defence was pleaded as follows:

1. That the appellant as head of her station was under a legal and moral duty to publish her findings after an enquiry conducted at the request of the addressee of her report.

2. That the addressee as Permanent Secretary was under a legal and moral duty or had a legitimate interest in receiving the report; and

3. That, accordingly, the occasion of the publication of the report is privileged.

[21] The evidence closely followed the pleading and the magistrate initially returned the positive finding that there was a legal duty on the appellant to

inform the Permanent Secretary about the state of affairs at her station (on his enquiry, I would add) and that she also had the authority to make a suggestion as to how this problem could be solved. But the magistrate went on to hold as follows:

> *"But to go as far as saying that the respondent was 'incompetent to work with ANYBODY was far fetched.... (and) the respondent "has proved on a balance of probabilities that at least this part of the publication was defamatory...."*

[22] And the magistrate awarded damages for defamation on that basis.

> To me, the effect of the subsequent finding qualifies the principle enunciated in *Marais v Haulypndjaba* that "if a qualified privilege were established or apparent from the proved facts, then the publication was lawful, **notwithstanding that it was defamatory and/or injurious**" (Emphasis added) and as we were not referred to any authority directly in point, the issue requires consideration and clarification by the Supreme Court.

[23] For the above reasons, I would hold that there are reasonable prospects of success on appeal on the claim of defamation.

[24] The second claim arises from a charge of theft laid by the appellant against the respondent which led to his arrest, which is not denied. However, the defence was that the appellant was under a legal and moral duty and had a legitimate interest and acted in the public interest when she laid the charge

as it was based on the affidavits of witnesses relating to the removal of certain statements she had left on her desk in her office: the only person who could possibly have had any interest in the statements is the respondent and he had access to the appellant's office. However, the Prosecutor General declined to prosecute. I would find that the defence to this claim also raises a crucial point of the limits of malicious prosecution in the circumstances to which the appellant averred, see *Westhling et al, supra*, p. 319, 2nd paragraph. In my view, the law on the point also requires clarification by the Supreme Court.

The result is as follows;

1. The application is allowed: condonation of the appellant's non-compliance with Rule 54 of the Rules of Court is granted and the appeal is hereby re-instated.

2. The respondent was entitled to resist the application. Therefore, there will be no order for costs.

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MANYARARA, AJ

I agree

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SILUNGWE, AJ

COUNSEL ON BEHALF OF THE APPELLANT:

Mr N Marcus

Instructed by: Government Attorney

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv. D Obbes

Instructed by: Lentin, Botma & Van Den Heever