REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 44/2015

In the matter between:

CAMERON BAMPTON
t/a CYD CONSTRUCTION DRAUGHTING
SERVICES **APPELLANT/APPLICANT**

And

JAJ VON WIELLIGH **FIRST RESPONDENT**

ES MOLEFE N.O **SECOND RESPONDENT**

Neutral citation: *Bampton v Von Wielligh* (CA 44-2015) [2015] NAHCMD 293 (3 December 2015)

Coram: PARKER AJ
Heard: **5 October 2015**
Delivered: **3 December 2015**

Flynote: Appeal – Late prosecuting of appeal – Appeal considered to have lapsed – There being no application to condone non-compliance with the rules of court there is no appeal properly before the court for the court to adjudicate on – Consequently, the appeal struck from the roll with costs.

Summary: Appeal – Late prosecuting of appeal – Counsel for appellant sought to place before court reasons why rule 116(5) of the rules of court could not be complied with – Counsel mentioned difficulty in obtaining the record to be delivered

to the registrar – Appeal considered to have lapsed – There was no application to condone non-compliance with rules – Appellant could have stated in such application reasons why the rules could not be complied with for court to consider whether to condone late prosecuting of appeal and re-instatement of appeal – Accordingly, court found there was no appeal properly before court for the court to adjudicate on – Consequently, appeal struck from the roll with costs.

ORDER

The appeal is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This is an appeal against the whole judgment and orders by the Magistrate's Court, Rundu. On 30 March 2015 the appellant noted the appeal in terms of rule 51(3) and (4) of the Magistrate's Court Rules, read with rule 116(1) of the rules of court.

[2] On 24 June 2015 the appellant, pursuant to rule 116(5) of the rules of court, did request from the registrar in writing and on notice to the respondents for the assignment of a date for the hearing of the appeal ('the written request'). A hearing date was duly assigned.

[3] The respondents have raised a preliminary point which I should perforce consider at the threshold as its determination can dispose of the matter. It is this. The

respondents contend that the appeal should be considered lapsed within the meaning of rule 116(1) of the rules. The appellant's firm position is that the appeal has not lapsed. To determine this issue I should have recourse to the interpretation and application of the relevant provisions of the Magistrate's Court Rules and the rules of court.

[4] Rule 51(9) of the Magistrate's Court Rules provide:

'The party noting an appeal or cross appeal shall prosecute (the) same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary.'

And the number of days prescribed by the rule of court is contained in subrule (1) of rule 116 which must, for the purposes of the present proceeding, be interpreted and applied intertextually with subrules (5), and (8), and, according to Mr Boesak, counsel for the appellant, subrule 12, of rule 116 of the rules. These are the provisions:

'116 (1) An appeal to the court against the decision of a magistrate in a civil matter must be prosecuted within 60 days after the noting of the appeal and unless so prosecuted it is without further notice, considered to have lapsed.

(5) The appellant must, within 40 days of noting an appeal, request from the registrar in writing and on notice to all other parties for the assignment of a date for the hearing of the appeal and must at the same time make available to the registrar in writing his or her full residential and postal addresses and the address of his or her legal practitioner if he or she is represented.

(12) The appellant must simultaneously with delivery of the application for a date for the hearing of the appeal referred to in subrule (5) –

(a) obtain a copy of the record from the clerk of the magistrate's court in question and deliver a copy of the record to the registrar, which record must comply with the requirements set out in rule 117; and

(b) if the appeal is to be heard by more than one judge the appellant must, on the request of the registrar, lodge a further copy of the record for each additional judge.'

[5] I should now interpret and apply those provisions. But before I do that, I should signalize this crucial point: The appellant has not sought any indulgence from the court to condone the prosecution of the appeal out of time, as Mr Van Zyl, counsel for the first respondent, submitted. Therefore, if I find that the appeal has been prosecuted out of time, the appellant cannot take advantage of, and be thankful of, the authoritative considerations set out by the Supreme Court as guidelines for the determination of applications to condone non-compliance with rules of court. (See *Rally for Democracy v Electoral Commission for Namibia* 2013 (3) NR 664 (SC), paras 64 -68.) It seems to me that appellant has not made any application for condonation and reinstatement of the appeal because the appellant has persistently laboured under the position, as I have mentioned previously, that the appeal has not lapsed. That position was, indeed, articulated vigorously by Mr Boesak in these proceedings.

[6] The appeal was noted on 30 March 2015. The written request was made by the appellant on 24 June 2015, that is, 54 days after the appeal had been noted. It follows clearly and irrefragably that the appeal is 'deemed to have lapsed', in the language of Magistrate's Courts Rules, and is 'considered to have lapsed', in the language of the rules of court. (See *Nathinge v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014).)

[7] For Mr Boesak, the appeal has not lapsed. And what is counsel's reason for so proclaiming? It is simply this. Counsel says that subrule 116(12) provides that an

appellant 'must simultaneously with delivery of the application for a date for the haring of the appeal –

> '(a) obtain a copy of the record from the clerk of the magistrate's court in question and deliver a copy of the record to the registrar, which record must comply with the requirements set out in rule 117; and
>
> (b) if the appeal is to be heard by more than one judge the appellant must, on the request of the registrar, lodge a further copy of the record for each additional judge.'

[8] I have said previously that subrules (1), (5), (8) and (12) should be read intertextually. It is subrule (8) which defines 'prosecuted', which is used in subrule (1). The appeal is duly 'prosecuted' upon the mere receipt of the written 'request'. And what is the 'request'? The request is a 'request from the registrar in writing and on notice to all other parties for the assignment of a date for the hearing of the appeal'. If the intention of the rule maker was to make the implementation of subrule (5) subject to subrule (12), he would have made such of his intention clearly known by express words. He has not done that. In that event, one cannot subject the implementation of subrule (5) to subrule (12). To argue, as Mr Boesak did, is to arrogate to oneself a better knowledge of what the rule maker intended than what the rule maker actually had in mind when it expressed himself clearly as he did in subrules (1), (5), (8) and (12) of rule 116. See *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 (HC) at 798D-E.

[9] In this regard, it must be remembered that the appellant does not tell the court that he complied with rule 116(5) within the time limit but the registrar refused to accept his written request unless he delivered at the same time a copy of the record to the registrar. In that event, in my opinion, an appellant who is desirous of acting reasonably and desirous of complying with the rules would have taken reasonable steps by applying to the court to extend the *dies*, as Mr Van Zyl submitted, on the basis that the record was not ready and the registrar says she would not accept the

written request unless the record was delivered to her. These are matters the appellant could have relied on in a supporting affidavit for a condonation application.

[10] In *Pietersen-Diergaardt v Fisher* 2008 (1) NR 307, the appellant had noted an appeal on 17 January 2007. His counsel subsequently received the record from the clerk of the magistrate's court on 30 April 2007. On 11 May 2007, counsel applied to the registrar for the assignment of a date for the hearing and simultaneously lodged two copies of the record. Having prosecuted the appeal out of time, counsel made an application for condonation and re-instatement of the appeal. Upon the authorities, the court there granted condonation for non-compliance with rules of court. The appellant's main supporting plank in the condonation application was that he had difficulty obtaining the record from the lower court.

[11] I do not find any good reason to treat the difficulty counsel in *Fisher* had in obtaining the record from the difficulty, Mr Boesak submitted from the Bar, the appellant in the present case had in obtaining the record. The only difference is that in *Fisher* counsel acted conscientiously and reasonably and applied to the court to condone the non-compliance with the rules, and his explanation was accepted by the court as good and satisfactory. The appellant in the present proceeding did not see the need for such application, much to his detriment.

[12] Based on these reasons, I find that the appellant has not complied with rule 116(5) of the rules, and he has not applied to the court to condone such non-compliance. Accordingly, the appeal is considered to have lapsed. There is no appeal properly before the court for the court to adjudicate on.

[13] Accordingly, the appeal is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

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C Parker

Acting Judge

APPEARANCES

APPELLANT /
APPLICANT : A W Boesak
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

FIRST
RESPONDENT: C J Van Zyl
Instructed by Strauss Attorneys c/o Delport Nederlof Attorneys, Windhoek

SECOND
RESPONDENT: No appearance