

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: ALEX KAMWI KAMWI V THE STATE	Case No: HC-MD-CIV-ACT-OTH-2017/01050 Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 12 APRIL 2019 Date of order: 15 APRIL 2019 Reasons delivered on: 15 APRIL 2019
Neutral citation: <i>Kamwi v The State</i> (HC-MD-CIV-ACT-OTH-2017/01050) [2019] NAHCMD 99 (12 April 2019)	
Results on merits: Application for leave to appeal: malicious prosecution	
The order: Having heard IPUMBU TITUS for the Plaintiff and MEHLULI NDLOVU , for the Defendants, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. Applicant's application for condonation is hereby dismissed. 2. Applicant's application for leave to appeal is hereby dismissed. 3. No order is made as to costs. 	
Reasons for orders:	
<u>Introduction and brief background</u> [1] This court in a judgment dated 13 November 2017 delivered a ruling on a special plea raised by the respondents against the applicant's application for malicious prosecution which was dismissed. ¹ The full reasons for the ruling were given on 29 November 2019. ² Applicant, not satisfied with the judgment, filed his leave to appeal on 17 January 2018 and later withdrew the application on 12 March 2018. He thereafter applied for legal aid and on 12 April 2018, Mr Ipumbu was appointed by the Directorate of Legal Aid to represent the applicant. Applicant then only filed his leave to appeal and condonation application on 28 June 2018.	

¹ Alex Kamwi Kamwi v The State (HC-MD-CIV-OTH-2017/0150) [2017] NAHCMD 339 (28 November 2017).

² Uploaded on the court's e-justice system.

[2] The respondents filed notices to oppose both the application for condonation and application for leave to appeal.

The issues

[3] On behalf of the respondent three issues were raised for determination:

- a. Whether or not applicant has made out a case for condonation for his non-compliances.
- b. Whether or not applicant has prospects of success to justify a condonation of his various wilful non-compliances.
- c. Whether or not the court's decision was interlocutory thus requiring leave or it was final in nature and appealable as of right.

Parties' submissions

Applicant

[4] It is vital to indicate from the onset that Mr Ipumbu, counsel for the applicant, made oral submissions which were never raised in the founding affidavit of the applicant in respect of the condonation application, to which counsel for the respondent took issue with. I will therefore not consider such oral submission as it is well known that an applicant seeking condonation must make out his or her case on the papers submitted and explain fully the delay and the failure to comply with the rules.

[5] On the issue of condonation and more specifically the non-compliance with the rules of court, the applicant argued that he did not wilfully file his notice for leave to appeal late due to various reasons: Mr Ipumbu, counsel for the applicant, submitted on behalf of the applicant that when the reasons for the ruling came out in November 2017 the applicant had travelled to his village where there is no internet connections and was therefore not aware that the reasons were uploaded on the e-justice system. He further argued that no one made any attempts to contact the applicant and inform him that the reasons were out, notwithstanding the fact that the applicant provided his contact details on the court documents for service. He submitted that the applicant only became aware of the reasons on 14 January 2018 when he returned to a place where there was internet connections. The applicant thereafter filed his application for to appeal on 17 January 2018 as he was under the impression that the matter which was before court was an interlocutory matter.

[6] The applicant then filed a notice to remove the application for leave to appeal from the roll on 12 March 2018 after he realised that it was not necessary to file the said application for leave as the special plea is not an interlocutory application and needed to note an appeal as of right to the Supreme Court.

[7] Applicant thereafter applied for legal aid and on 12 April 2018 Mr Ipumbu was appointed by the Directorate of Legal aid to prosecute the appeal. It was only in May 2018 that the applicant consulted with Mr Ipumbu and only on 28 June 2018 that the application for condonation and leave to appeal was noted. Mr Ipumbu submitted that the time the applicant applied for legal representation and thereafter instructions were given to him cannot be regarded as wilful, glaring and flagrant non-compliance with the Rules of Court.

[8] On the issue of prospect of success, Mr Ipumbu submitted that the Court misdirected itself in law when it concluded that the malicious proceedings of 2004 have no bearing on the criminal proceedings which were reinstated in 2016. He further submitted that if one were to apply the principles in *Akuake v Jansen van Rensburg*³ there was no reasonable or probable cause to prosecute the applicant between 2004 to 2007, reason being that the respondents ignored section 21 of the Legal Practitioners Act⁴. Counsel further submitted that the applicant was the sole member of the Close Corporation⁵, whereby the latter was authorised by the Close Corporations Act⁶ to carry out the activities set out in s 21 (1) (c) of the Legal Practitioners Act. Counsel submitted that although the respondents were aware of this, they nonetheless prosecuted the applicant for a lengthy period. He therefore submitted that the prosecution by the respondents with the full knowledge of s 21 (1) (c) of the Act was meant to intentionally cause harm to the applicant.

[9] Counsel quoted s 6⁷ of the Criminal Procedure Act⁸ and submitted that the wording 'withdraw' must be given its ordinary and grammatical meaning and that in terms of the Concise Oxford Dictionary 'withdrawal' is defined as 'discontinue, cancel or retract'. He submits that the withdrawal of the charges against the applicant in 2007 resulted in the finality and termination of the criminal proceedings against the applicant in his favour in

³ 2009 (1) NR 403 HC.

⁴ '1. A person who is not enrolled as a legal practitioner shall not –

(a);

(b); and

(c) Issue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of law in the name or on behalf of any other person, except is no far as it is authorized by any other law.'

⁵ Nationwide Detectives and Professional Practitioners CC, wherein the applicant was the sole member and faces charges in the Regional Court of contravening s 21 of the Legal Practitioners Act.

⁶ No. 26 of 1988.

⁷ 'The Prosecutor-General or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may-

(a) Before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;

(b)'

⁸ No. 51 of 1977, as amended.

the present matter. Counsel therefore submits that the reinstatement of the criminal proceedings in 2016 is irregular or constitutes an illegality by the respondents and that the respondents are not entitled to reinstate the same charges.

Respondent

[10] Mr Ndlovu argued on behalf of the respondents that the applicant has failed to comply with the requirements for condonation in all aspects and that his application has been unduly delayed without reason. He referred to Rule 7 of the Rules of the Supreme Court which stipulates as follows:

'7. (1) Every appellant in a civil case who has a right of appeal must file his or her notice of appeal with the registrar and the registrar of the court appealed from and serve a copy of the notice on the respondent or his or her legal practitioner within 21 days or such longer period as may be allowed on good cause shown, after –

(a) the judgment or order appealed against,, has been pronounced.

....

(3) The notice of appeal referred to in subrule (1) must –

(b) state whether the whole or part of the judgment or order is appealed against, except that where an appeal is noted against an order where reasons have not been given, this rule must be complied with not more than 14 days after the reasons have been given;'

[11] Mr Ndlovu submits that from the date of the order, applicant had 21 days to file the appeal however he failed to lodge his appeal. He further submits that even though the applicant alleges that he required leave to appeal, he had to comply with Rule 115 of the High Court Rules in that he had to request leave to appeal at the time of the judgment or order; or he had to request leave to appeal together with grounds of appeal within 15 days after date of order; or he had 15 days to appeal from date of the reasons being provided if the full reasons for the judgment or order are given at a later date than the date of judgment or order. The court may also, on good cause shown, extend the period of 15 days. Counsel submits that applicant failed to comply with Rule 115 if he had a bona fide belief that he needed leave to appeal. In this regard counsel referred to the case of *Molebatsi v Federated Timbers (Pty) Ltd 1996 (3) SA 92 (B)*, which was cited with approval in *S v Kakololo (CA42/2001) [2002] NAHC 6 (5 November 2002)*.

[12] Counsel submitted that applicant's explanation that he only became aware of the reasons for the judgment on 14 January 2018 falls short of the standard of a diligent man. He submitted that applicant failed to explain, satisfactorily why, having been granted legal aid on 12 April 2018 and consulting his appointed legal representative in May (in counsels word 'another vague assertion which fails the requirements of a full and

detailed explanation for his failure'), the application of leave to appeal was only filed on 28 June 2018. Counsel referred the court to cases such as *Jonhson v Indongo Sky Gems (Pty) Ltd* 1997 NR 239 (HC) at 240-241; *Akwenye v Amadhila* (HC-MD-CIV-ACT-CON-2017/02946) [2018] NAHCMD 114 (27 April 2018); *Gomes v Meyer* (SA 33/2014) [2017] NASC (12 April 2017) and *IA Bell Co Namibia (Pty) Ltd v ES Concrete Industries CE* (I 1860/2014) [2015] NAHCMD 93 (23 March 2015) para 9. Counsel therefore submits that the applicant failed to explain why he took two and a half months to bring the application for leave to appeal.

[13] On the question of prospects of success counsel submits that the court did not err in finding that the requirements of malicious prosecution were not met. He argues that there was no termination of the proceedings in favour of the applicant in that applicant was still being prosecuted for the alleged offences that he was charged with in 2004. He further submits that in criminal proceedings a case can be reinstated if it was withdrawn before plea and that the claim can only arise once the proceedings have been terminated.

[14] On the issue of the appealability of the order and or judgment, counsel submits that the order appealed against was final and definitive of the parties' rights and that it disposed of the issues between the parties in total and was therefore not interlocutory and was appealable as of right. Counsel's argument is that there was and still no need for an application for leave to appeal. The right to appeal was automatic. He referred the court to the landmark case of *Di Savino v Nedbank Limited*⁹ wherein the court referred to the case of *Knouwds NO v Josea and Another* (SA 5/2008) [2010] NASC 9 (14 September 2010) and in which the court held that:

'[40] In *Knouwds v NO v Josea & another*¹⁰, in the course of the discussion of the question whether the order of the High Court in that case was appealable with or without leave, Strydom AJA acknowledged the endorsement by this Court of the definition of the words 'judgment or order' in *Zweni* and reiterated the position of our law at para 10 as follows:

"... Generally speaking the attributes to constitute an appealable judgement or order are threefold, namely, the decision must be final, be definitive of the rights of parties or must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding. In terms of sec. 18(3) of the High Court Act *interlocutory orders are not appealable as of right and need the leave of that Court or, if that was refused, the leave of the Chief Justice, given by him on petition, to be able to come on appeal*" (Emphasis supplied)

[41] At para 12 of the *Knouwds* judgment, with reference to the decision of the South African Appellate Division in *Moch*¹¹, Strydom AJA observed that situations may arise where the effect of a court's order may be such that it has a final bearing on the rights of the parties. In such an instance, the order is not interlocutory and is appealable as of right.'

⁹ (SA 82/2014) [2017] NASC 32 (07 August 2017).

¹⁰ Note 12 above

¹¹ Note 13 above

[15] Counsel argues that a special plea was upheld in this matter, which effectively disposed of the action and that the order and judgment was final in nature and could not be regarded as interlocutory. As there being no need for leave, the order sought by the applicant cannot be granted and is of '*brutum fulmen*' and in any event the appeal is miserably out of time.

Applicable law and application of the law to the facts

[16] From the onset I must remark that I am fully in agreement with the case law and legal principles this court was referred to by Mr Ndlovu.

[17] The principles of condonation were reaffirmed by the Supreme Court in *Minister of Health and Social Services v Amakali Matheus*¹² as follows:

'[17] An applicant seeking condonation must satisfy the following requirements.¹³ He or she must provide a reasonable, acceptable and bona fide explanation for non-compliance with the rules. The application must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.¹⁴ Lastly, the applicant must satisfy the court that there are reasonable prospects of success on appeal.

[18] There are a range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted.¹⁵ These include 'the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits, the importance of the case, the respondent's (and where applicable, the public's interest in the finality of the judgment), the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice'.

[18] It is clear from the applicant's founding affidavit for condonation that he has failed to meet the requirements as set out in the above case. He has failed to give an entire account of what happened during the period when a legal representative was appointed on 12 April 2018 until their consultation on an unknown date in May 2018. He has failed to give an explanation, as rightfully pointed out by Mr Ndlovu, why the affidavit for condonation for leave to appeal was signed and commissioned on 13 June 2018 but the leave to appeal was only filed on 28 June 2018. No explanation was given for the late filing of the application and more so no

¹² (SA 4/2017) [2018] NASC (6 December 2018).

¹³ *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F and *Jossop v The State* (SA 44/2016) NASC (30 August 2017).

¹⁴ See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2014] NALCMD 41 (17 October 2014).

¹⁵ *Gomes v Meyer* (SA 33/2014) NASC (12 April 2017).

indication was given why after consulting in May they filed their leave to appeal late. If a legal practitioner and/or lay litigant decides to follow the rules when it pleases him or her to do so then it will defeat the whole purposes of the rules. I can take it no further than agree with what Langa AJA held in *Beukes and Another v South West Africa Building Society (Swabou) and 5 Others*¹⁶ that:

'[20] I have borne in mind that prospects of success are often an element, sometimes an important factor that could influence a decision whether or not to grant condonation in a proper case. It is however also true that, in the jurisprudence of both South Africa and Namibia, although prospects of success would normally be a factor in considering whether or not condonation should be granted, this is not always the case when non-compliance of the Rules is flagrant and there is glaring and inexplicable disregard of the processes of the court.'

[19] As to the question of prospect of success I will not deviate from my judgment wherein I have held that malicious prosecution only arises when the criminal proceedings have terminated in the applicants favour and not before. It is common cause that the case reinstated against the appellant in 2016 emanating from the charges that were withdrawn in 2007, is still ongoing in the Regional Court and have not terminated in the applicant's favour. There is therefore no prospects of success on appeal as the criminal proceedings are pending.

[20] With regard to the issue of whether the judgment and order is appealable with or without leave I will refer to the case of my learned brother Masuku J of *Uvanga v Steenkamp and Others*¹⁷ wherein he differentiated between interlocutory matters and special pleas as follows:

'[16] It must also be borne in mind that in a proper case, a special plea is capable of being dispositive of the entire cause of action between the parties, a characteristic that does not normally attach to interlocutory proceedings, which normally deal with preliminary issues that do not go to the essence of the core issues in dispute. I shall deal with the latter aspect when I refer to authority that defines the two subjects of our discourse in this matter and which should clarify the proper position in this matter beyond any disputation in my respectful view.

....

[19] On the other hand, the Black's Law Dictionary, defines 'interlocutory' as meaning 'interim or temporary, not constituting a final resolution of the whole controversy.' I am of the considered view that the special plea in this matter was sought to quash the entire claim and the fact that it was dismissed does not detract from its intended effect. More importantly, in my view, it was not raised as an interim or temporary measure but, as stated, was geared towards having the entire case indirectly dismissed, even though not on the merits.

¹⁶ (SA 10/2006) [2010] NASC 14 (5 November 2010).


¹⁷ (I 1968/2014) [2016] NAHCMD 378 (2 December 2016).

[20] It must also be mentioned that another major difference between interlocutory matters and special pleas is that a party dissatisfied with the decision or ruling in an interlocutory may not appeal to the Supreme Court as of right. They would have to seek and be granted leave by this court, failing which, petition the Chief Justice. In these matters, however, where a special plea has been granted or dismissed, as the case may be, the aggrieved party does not have to seek leave but may apply to the Supreme Court as of right. This is another telling difference between the two species of proceedings.'

[21] I am fully in agreement with my learned brothers ruling. In this matter a special plea was raised by the respondents and which was upheld disposing of the action and the order was consequently final and could not be regarded interlocutory in nature as it disposed of the whole action.

[22] I agree with Mr Ndlovu that applicant's condonation is late and it was unnecessarily brought before this court as the appellant had right of appeal (the judgment and order was appealable as of right). Even if the appellant were to note an appeal now it is hopelessly out of time and in any event the criminal proceedings are still pending in the lower court and there is therefore no prospect of success on appeal. If I were to accept the applicant's application for leave to appeal, in a matter that does not even require such an application, it will bring the applicant's appeal within the courts timeline for an appeal, circumventing the Supreme Court Rules.

[23] My order is therefor set out as above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondents
Mr Titus Ipumbu Of Titus Ipumbu Legal Practitioners	Mr Mehluli Ndlovu Of Government Attorney