

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case Title: TJAKAZENGA KAMUHANGA KAMUHANGA & OTHERS v OVAMBANDERU TRADITIONAL AUTHORITY & OTHERS	Case No: HC-MD-CIV-APP-AMC-2019/00024
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE GEIER	Date reserved: 23 JUNE 2020
	Delivered on: 08 DECEMBER 2020
Neutral citation: <i>Kamuhanga v Ovambanderu Traditional Authority</i> (HC-MD-CIV-APP-AMC-2019/00024) [2020] NAHCMD 541 (8 December 2020)	
IT IS ORDERED THAT: a) The application for condonation, delivered on 16 March 2020, is hereby struck from the roll with costs. b) The appeal, noted on 4 December 2019, has lapsed and is struck from the roll with costs. c) All costs orders made are to include the costs of one instructed- and one instructing counsel.	
Following below are the reasons for the above order:	
<p>[1] Once again – and before the merits of this appeal are to be considered – the requirements, or rather, in this instance, the alleged failure to substantially comply with the requirements imposed by Rule 32(9) and (10) of the Rules of Court - are to be</p>	

determined in limine.

[2] The point arises as a result of a condonation application delivered on 16 March 2020 in which the appellant seeks condonation for his 'non-compliance with rule 116 read with 102 of the Rules of Court' and thus more particularly with his failures in regard to the filing of the complete record.¹

[3] The appellant requires the sought condonation to sustain his noted appeal, which has lapsed² - as a civil appeal from a magistrates court must be prosecuted within 60 days of the noting of the appeal – and - unless so prosecuted - is considered as having lapsed.³

[4] In this regard the related question that has been raised is that the appellant has, in any event utilised the wrong procedure and has applied for the wrong relief⁴, as a lapsed appeal cannot be salvaged through a condonation application, but rather requires an application for its re-instatement.

[5] That the latter proposition has merit is clear from the general- and daily practice followed in this regard⁵ and in view of the appellant's failure to seek the requisite reinstatement, which failure becomes even more inexplicable as the appellant is a senior legal practitioner of this Court.

[6] What compounds this failure is the cavalier manner in which the appellant has attempted to comply with the requirements imposed on him by Rules 32(9) and (10) of

¹ See : Prayers 1 and 2 of the Notice of Motion dated 13 March 2020.

² Although the appellant requested – for the first time the assignment of a hearing date on 13 February 2020 which was just within the prescribed 60 day period – the appeal having been noted on 4 December 2019 – it is clear that no date could be allocated on 26 February 2020 due to the fact that the record was not complete , also electronically – and still is not complete to date – but that the Registrar nevertheless allocated a date to the appellant subsequently on 4 March, which was clearly outside the requisite 60 day period – the provisions of Rule 116(8) are thus of no assistance to the appellant in the circumstances and the appeal was thus not duly prosecuted and has lapsed therefore - take into account in this regard also -mutatis mutandis - what the Court concluded in *Katima Mulilo Town Council v Muyoba* (HC-MD-LAB-APP-AAA-2017/00019) [2019] NALCMD 39 (20 September 2019) at [48] to [58].

³ See : Rule 116(1) of the High Court Rules –

⁴ The relevant prayers in the Notice of Motion read: '1. Condonong the Applicant's non-compliance with rule 116 read with 102 of the Rules of the Honourable Court' and '2. Granting to the applicant the condonation with regard to the filing of a complete appeal record.'

⁵ Compare for instance generally the relief sought- or which ought to have been sought in : *Rally for Democracy & Progress v Electoral Commission for Namibia* 2013 (3) NR 664 (SC) , *Katjaimo v Katjaimo* 2015 (2) NR 340 (SC), *Somaeb v Standard Bank Namibia Ltd* 2017 (1) NR 248 (SC), *Road Fund Administration v Skorpion Mining Co (Pty) Ltd* 2018 (3) NR 829 (SC) or *Dannecker v Leopard Tours Car and Camping Hire CC and Others* 2019 (1) NR 246 (SC) and many others.

the Rules of Court, once he realised that the said condonation application was required.

[7] Mr Chibwana, who acts for the respondent in this matter argued this point as follows :

‘The law in relation to rule 32 (9) and (10) of the rules of this court is trite. The leading cases are Mukata vs Appolus⁶ and Bank Windhoek vs Benlin⁷ these two cases set out the approach to be adopted in terms of rule 32 whenever an interlocutory application is sought to be instituted.

In Mukata supra the court found that compliance with rule 32 was peremptory. The court then provided guidance to a respondent who sought to raise non-compliance with rule 32. The court stated as follows:

“[7] one last word; in keeping with judicial case management process in which parties and counsel are expected to cooperate among themselves and with the court in order to attain expeditious and just disposal of cases by the court, the defendant’s legal practitioner should have at an appropriate judicial case management conference requested the court not to sit down on the interlocutory application for hearing because 32 (9) and (10) have not been complied with. Counsel should not wait until during the hearing to argue that rule 32 (9) has not been complied with, particularly where such interlocutory application is contemplated in the parties’ case plan. For this reason, even though the defendant has been successful, he should be denied his costs.

If we apply the considerations in Bank Windhoek supra, we submit that the minimum requirements in respect of rule 32 (9) and (10) were not met by the appellants. These requirements in brief are the following:

- i. The writing of a letter by the initiator;
- ii. The holding of a meeting at a certain place on a named date to discuss the matter;
- iii. Both parties may not go through the n(m)otions.

FACTS IN RELATION TO RULE 32

On 12 March 2020 the appellants legal practitioners filed a report in terms of rule 32 (10). The following is evident from as a perusal of the report; that on 11 March 2020 the appellants legal practitioners sent a letter in terms of rule 32 (9) to the respondents legal practitioners and thereafter that on 12 March 2020 a telephonic conversation took place between the legal practitioners of the appellants and the respondents; where upon the respondents legal

⁶ 2015 (3) NR 695 (HC).

⁷ 2017 (2) NR 403 (HC).

practitioner notified the appellants legal practitioner that discussions would take place with instructed counsel and only after those discussions would a response be forthcoming. It is common cause that the rule 32 (10) report was filed on the same date of the telephonic conversation, that is 12 March 2020. We submit that on those facts, which facts appear from the e-justice record there was non-compliance with rule 32 (9) and (10) of the rules of this honourable court by the appellants. We now turn to address the flawed condonation application.'

[8] The appellant failed to address this aspect altogether.

[9] The point is obvious and well taken. To write a letter informing the respondent's legal practitioner of the intended application and proposing a meeting to resolve the matter amicably was most certainly the correct manner through which to initiate the process envisaged by Rule 32(9). To then simply launch the application after having been informed by respondent's attorney that she needed to forward the letter to instructed counsel, without following up in this regard and without further notice was most certainly not what was required by the rule, which expressly obliges the parties to seek an amicable resolution of the issue which obviously contemplates and entails a meaningful engagement between the parties for such purpose and which thus requires a genuine attempt at resolving the interlocutory issue prior to the launching of any application in this regard.

[10] The point is further underscored by the content of the Rule 32(10) report, as filed by the appellant on 16 March 2020, from which it emerges that the said initiating letter, addressed by him, was dated 11 March 2020 and to which the respondent's legal practitioner replied telephonically on 12 March that she would have to forward the letter to counsel. The appellant then simply proceeded to state in the Rule 32(10) report, of the same date, (12 March), that he is yet to receive a response. He then proceeded to file the report without further ado and also the application for condonation without awaiting a response and obviously also without having sought the required amicable resolution in any way whatsoever.

[11] The failure to substantially comply with Rule 32(9) can obviously not be rectified by the filing of a report in accordance with Rule 32(10), as compliance with Rule 39(9) is obviously a necessary 'condition precedent' for the successful clearance of the hurdle imposed by the sub-rule prior to the launching of any interlocutory application.

[12] It so becomes clear that the appellant has not complied, as he was obliged to do, meaningfully and substantially, with Rule 32(9).

[13] The result that is to follow is predetermined ⁸ and will have to be that the condonation application launched on 16 March 2020 will have to be struck with costs.

[14] The impact on the appeal will be similar. I have already found that the appeal has lapsed. The order that is to follow on that account is also that the appeal will have to be struck with costs. In addition I have also already indicated my agreement with respondent's counsel's submission that the launching of the condonation application was inappropriate in the circumstances of the matter and that the appellant should rather have brought an application for the reinstatement of the appeal.

[15] In any event – and in so far as a lapsed appeal may nevertheless be reinstated through an application for condonation – (after all it is also condonation for the undue prosecution of an appeal that will have to be sought in an application for its reinstatement) – the present condonation application can certainly not be of any assistance to the appellant as it will be struck.

[16] In the result I make the following orders:

- d) The application for condonation, delivered on 16 March 2020, is hereby struck from the roll with costs.
- e) The appeal, noted on 4 December 2019, has lapsed and is struck from the roll with costs.
- f) All costs order made are to include the costs of one instructed- and one instructing counsel.

Judge's signature:

Note to the parties:

⁸ See for instance *Mukata v Apollus* 2015 (3) NR 695 (HC at [6], *CV v JV* 2016 (1) NR 214 (HC) at [10] – [11], *Bank Windhoek Ltd v Benlin Inv CC* 2017 (2) NR 403 (HC) at [7] – [8], *Naanda v Edward* (I 2097/I/2014) [2017] NAHCMD 107 (22 March 2017) at [29] – [31] and *Standard Bank of Namibia Limited v Nekwaya* (HC-MD-CIV-ACT-CON-2017/01164) [2017] NAHCMD 365 (01 November 2017) at [28].

	Not applicable.
Counsel:	
Applicant	Respondent
<p>T K Kamuhanga of Kamuhanga Hoveka Samuel Inc. Windhoek</p>	<p>T Chibwana Instructed by Government Attorney Windhoek</p>