

REPORTABLE

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

CIVIL APPEAL JUDGMENT

Case no: CA 03/2015

In the matter between:

**METROPOLITAN NAMIBIA**

**APPELLANT**

and

**AMOS NANGOLO**

**RESPONDENT**

**Neutral citation:** *Metropolitan Namibia v Nangolo* (CA 03/2015) [2017]  
NAHCNLD 02 (30 January 2017).

**Coram:** CHEDA J

**Heard:** 11 November 2016

**Delivered:** 30 January 2017

**Flynote:**

A party seeking condonation must give a reasonable and acceptable explanation for its non-compliance. It must also show prospects of success. The courts will not grant condonation where there is a flagrant and explicable disregard of the rules.

**Summary:**

Appellant appealed against the dismissal of an application for condonation for the late noting of an appeal against a judgment and order by the District of Labour Court. Its explanation for its failure to act timeously was that it was due to the negligence of its legal practitioners. These reasons were held not to have been enough to excuse it from its own negligence and that of its legal practitioners.

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**ORDER**

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1. The appeal is dismissed with costs.
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**JUDGMENT**

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CHEDA J:

[1] This is an appeal against the dismissal of an application for condonation for the late noting of an appeal against a judgment and order of the District Labour Court for the district of Eenhana (hereinafter referred to "DLC").

[2] Appellant submitted that this court determines the above appeal and if it is successful it should then proceed to determine the main appeal, which is the appeal against the initial judgment.

[3] This appeal emanates from a hearing that was held in the District Labour Court whose judgment was handed down on the 17 December 2012.

[4] On the 03 June 2014 appellant filed an application for condonation for the late noting of its appeal with its notice of appeal against the judgment and orders of the DLC handed down on the 17 December 2012.

[5] It is appellant's assertion that it became aware of the judgement that was delivered on 17 December 2012 on the 23 April 2014. It became aware of it by a letter from its correspondent attorneys who became aware of it on the 12 April 2013 and its correspondent attorneys had received same from court on the 14 March 2013.

[6] On the 26 April 2013 appellant's attorneys requested for instructions from appellant with regards to whether or not they should appeal the said judgment. It is further its averment that copy of the judgement was forwarded to its legal practitioner by Mr. Greyling (correspondent attorney) on the 12 April 2013. It went further and submitted that it became aware of the judgment in April 2013. I will come to this point later.

[7] Applicant has submitted that its failure to note an appeal timeously was due to Mr. Greyling's negligence as it stated that on many occasions he refused and /or neglected to respond to their requests for information regarding the record and other related issues. There were three legal practitioners involved in this matter, namely Van der Merwe - Greef Andima, Ms Miller and Mr. Greyling.

[8] It is its submission that its failure to act timeously was not wilful, but, was due to some administrative mishaps and mainly Mr. Greyling's dilatory conduct. It is for that reason that it seeks condonation for the late filing of the notice to appeal.

[9] On the other hand respondent has vigorously opposed both applications. In the first place he raised a *point in limine* being that applicant should not have brought the appeal in this matter at the same time with the application for condonation for the late filing of the appeal. Where appellant seeks to appeal against a certain decision and is out of time, it is only logical that it should apply for condonation for the late filing of the said appeal before it argues the appeal as the hearing will be based on whether or not the said application for condonation succeeds.

[10] To argue the appeal at this stage is a pre-supposition that the condonation application will succeed, which may not necessarily be the case. I, therefore, agree with respondent's legal practitioner that the procedure adopted by appellant is

indeed irregular as it is not provided for in our law. For that reason the *point in limine* is upheld.

[11] I now turn to the application for the late of filing of the notice of condonation of late noting of appeal. Respondent's argument in opposition is that applicants have failed to give a reasonable and satisfactory explanation for its failure to act timeously after it gained knowledge of a judgment/order against them and as such its application should be dismissed.

[12] It is also his argument that the fact that Mr. Greyling failed to advise his instructing legal practitioners or was uncooperative should not be accepted by the court. In addition that, the fact that at one point this matter was being handed by a junior legal practitioner as submitted by appellant should also not be excused. In a nutshell it is his submission that applicant was negligent.

[13] Applications for condonation for non-compliance with the rules coming before these courts are now too common, to an extent that they have now become fashionable. It should be borne in mind that it should be an exceptional practice which should only be resorted to by a litigant whose failure to comply is genuine and not a practice where litigants neglect their duties with a settled mind that they will be excused as long as they file an application for condonation. This should not be the case.

[14] An application for condonation should be an exception as opposed to being a general rule. It is for that reason that these courts have laid down stringent principles and/or requirements in order for one to succeed in that application.

[15] In our jurisdiction, the matter of *Telecom Namibia Ltd v Michael Nangolo & 34 Others* (LC 33/2009, unreported – 28/5/2012 2012), the following requirements can be gleaned:

- a) The condonation must be applied for and granted. In other words the applicant must satisfy the court that there is sufficient cause to warrant such

condonation, see *Beukes and another v Swabou & others* (SA 10/2006) [2010] NASC 14 (05 November 2010);

- b) applicant must give a reasonable and acceptable explanation for the delay or non-compliance. The application must be full, accurate and detailed; see *Beukes & another v Swabou & Others* (supra);
- c) it must be sought as soon as it has come to applicant's knowledge;
- d) the degree of delay is a relevant consideration;
- e) there should be an explanation as to the delay for the entire period; and
- f) applicant must demonstrate good prospects of success on merits.

[16] There is, however, a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. These courts have adopted a robust stance, but, in a strict sense a bottle necked one too, when approaching the question of condonation. The celebrated case of *Salojee and Another, NNO v Minister of Community Development 1965 (2) ALLSA 521 (A)* the appeal court set down the immutable principle regarding condonation, where Steyn C J stated:

"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. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (CF. *Hepworths Ltd v Thornloe and Clarkson Ltd., 1922 T.P.D. 336; Kingsborough Town Council v Thirlwell and Another, 1957 (4) SA 533 (N)*). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much

as directing any reminder or enquiry to his attorney (*cf. Regal v African Superslate (Pty.) Ltd., supra at p. 23 i.f.*) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.”(my emphasis)

[17] In this application, applicant imputes the blame on his legal practitioners. There was a time where three legal practitioners were involved. In terms of rule 19 (2), appellant should have noted its appeal 14 days from the date he become aware of the judgement or order. Appellant became aware of the judgement on the 23 April 2014 and only noted its application for condonation on the 03 June 2014, which was also almost 6 weeks from the date of its knowledge of the said judgment, not that it matters as it was already out of time.

[18] These courts have concretized the principle enunciated in Salojee’s case (*supra*) and came out with the more crystalized requirements as set out in Balzer v Vries 2015 (2) NR 547 (SC) at 551J – 552F where Smuts JA stated:

“It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.

This court recently usefully summarised the jurisprudence of this court on the subject of condonation applications in the following way:

‘The application for condonation must thus be lodged without delay, and must provide a full, detailed and accurate explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They 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 of the case, 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.*

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant and inexplicable.”(my emphasis)

[19] Applicant must establish a good cause which should be entirely a reasonable and an acceptable explanation for the delay. Applicant submitted that he left everything in the hands of its legal practitioners. In Salojee’s case, it was made clear that there is a limit to which a litigant can hide behind the negligence or inefficiency of its legal practitioner. The reason being that, applicant chooses its legal practitioner and must live with its choice. It is not for the court to dovetail into its legal practitioner’s capabilities. If the legal practitioner is inept or not diligent enough, then the litigant has a lot of remedies open to it.

[19] In my view where a party seeks to be excused for non-compliance and attributes that failure to someone else other than itself, then the alleged guilty party must as of necessity depose to an affidavit confirming its culpability. It is not enough to aver that someone else is responsible for its demise. In order to authenticate that averment, there is a need for corroboration. It is even more important where the alleged negligence is that of a legal practitioner as it has a bearing on his integrity. It would have helped if all the legal practitioners who are alleged to have been negligent to have filed affidavits admitting their short comings, in support of this application.

Therefore, that reason to me is not reasonable and is unacceptable in the circumstances as it does not find legal support.

[20] The further enquiry is whether or not there are any prospects of success. These requirements are not considered in isolation, but, cumulatively. Married to the above requirement is the length of the delay. Despite applicant's assertion that it became aware of the judgment on 23 April 2014, this is not true, as its correspondent attorneys received the judgement on 14 March 2013 and advised its instructing attorneys on the 12 April 2013. The receipt of this judgment by its correspondent legal practitioner is enough to justify "knowledge of the judgment" as stipulated by our rules and case authorities.

[21] On the 26 April 2013 applicant's legal practitioners sought further instructions from its clients. It is therefore clear that it waited for a year before it lodged its appeal. This delay is unreasonable and places into question the *bona fide* of appellants.

[22] An attempt to excuse itself from its failure to act timeously is that at one point the matter was being handled by a junior lawyer. The fact that the legal practitioners entrusted a junior legal practitioner with such an important matter is not excusable either.

[23] Mr. Aart Van der Vyver deposed to an affidavit in support of this application but failed to explain why applicant failed to instruct them during April 2013. They did nothing until respondent commenced execution. The non-compliance with the rules of court has been flagrant and inexplicable.

[24] In my view appellant failed to convince the court as to its failure to act timeously and as such the court's discretion cannot be judiciously exercised in its favour. I would like to hazard to add that, time has come that legal practitioners should diligently comply with the rules of court and not to relax in the hope that they will always apply for condonation and such applications will be automatically granted. It is appropriate that I use a quotation from the Holy Bible, in Job 38.3: it is written:

"Gird up now thy loins like a man, for I will demand of thee, and answer though me"



Compliance will not be granted as a matter of course.

[25] As pointed out above, condonation should not be a rescue plan for a deliberate or negligent legal practitioner, but, rather should only be resorted to when there has been a genuine error on the part of a litigant and/or legal practitioner. In my view time has now arrived that the tide of inefficiency on the part of legal practitioners should be met measure for measure.

[26] This application lacks merit and as such has failed to pass the rigorous test set down by the authorities. Appellant's negligence has been gross and the courts cannot be seen to legitimize such flagrant disregard of its rules in the circumstances, as to do so will be to subtly, unconsciously and unwittingly lend support to the destruction of its own rules, which is the foundation of their dignified existence. The District Labour Court's finding in rejecting applicant's overtures in this appeal cannot in my view be faulted.

Order:

[27] In the result the appeal is dismissed with costs.

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M Cheda  
Judge

## APPEARANCES

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