REPUBLIC OF NAMIBIA

NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: DLC 209/2008

BERNADETTE SIMANA **APPLICANT**

and

AGRIBANK OF NAMIBIA **FIRST RESPONDENT**
HONOURABLE CHAIRPERSON I J GAWANAB **SECOND RESPONDENT**

Neutral citation: *Simana v Agribank of Namibia* (DLC 209/2008) [2021] NALCMD 38 (22 July 2021)

Coram: GEIER J
Heard on: **22 July 2021**
Delivered: **22 July 2021**
Released: **19 August 2021**

Flynote: Labour law – reinstatement application – appeal – just like an application for condonation, it should be made at the earliest possible opportunity and with promptitude – applicant failed to explain the extremely lengthy periods of inactivity in prosecuting her appeal – applicant's non-compliance with the applicable rules are 'glaring', 'flagrant' and 'inexplicable' – application for reinstatement dismissed.

Summary: The facts appear from the judgment.

ORDER

The application for reinstatement of the appeal is dismissed.

JUDGMENT

GEIER J:

[1] What serves before the court today is an application to reinstate an appeal which was filed on the 24th of November 2016. The application for reinstatement was however only brought on the 24th of July 2020. Those are the naked facts. It was thus with reference to this delay incumbent on the applicant to show good cause, why, her application should be granted.

[2] It is also clear from the underlying facts, which are common cause, that the appeal lapsed on or about the 10th of February 2017.

[3] It appears immediately that no prompt application for reinstatement was brought.

[4] It was in those circumstances incumbent on the applicant to not only put before the court a reasonable explanation for her delay and for the default, of not prosecuting this appeal promptly and in accordance with the applicable rules, but also to show some prospects of success for the court to come to the conclusion that the merits of the matter and thus the prospects of success also require consideration.

The applicant's case

[5] The court heard lengthy arguments from both parties, and particularly from the applicant's side, emotional appeals were also directed to the court. Those appeals were to the effect that the court should ensure that justice be done. The

applicant throughout hammered home the point that she is an unrepresented lay person and that the court should therefore indulge her and – with reference to certain case law –
condone the obvious defects that her case disclosed. I will return to that facet of her argument.

[6] I should also mention that throughout her oral submissions, the applicant on various occasions and also in her written submissions went outside the four corners of the papers that had been exchanged through which she endeavoured to put forward certain facts for the consideration of the court which could not be found in the exchanged affidavits. The applicant was thus repeatedly advised that this was inadmissible for various reasons.

[7] As I have already indicated it would be apposite to consider the applicant's case for reinstatement firstly with reference to the allegations made in the papers and I thus proceed to do so first.

[8] In her founding papers she then discloses what the purpose of the application is or was and still is, and she then commences to sketch the relevant background namely with reference to the fact that the district labour court in this matter delivered a judgement unfavourable to the applicant on 4 November 2016. As the applicant felt aggrieved by this outcome an appeal was noted on 24 November 2016, which appeal subsequently lapsed as I have already indicated, and in respect of which reinstatement is now applied for. The applicant indicates that the first respondent filed its notice to oppose on the 10th of February 2017, which is also the date on which this appeal lapsed.

[9] It should further be mentioned that this case has a protracted history which started as far back as 2007, and in respect of which the District Labour Court eventually delivered a judgment in response to a complaint lodged by the applicant, and in which process the applicant was apparently throughout represented by Mr Tjitemisa of Tjitemisa and Associates. Tjitemisa and Associates were also the legal practitioners who noted the appeal on behalf of the applicant in November 2016. It so appears that Tjitemisa and Associates were the legal practitioners tasked to prosecute the appeal on behalf of the applicant. It was under their watch that the

appeal lapsed. It appears later from the papers that Tjitemisa and Associates apparently withdrew from representing the applicant and although no date is mentioned, it was mentioned in oral argument that this occurred only in March 2020.

[10] In paragraph 10 of her founding papers, the applicant then alleges that after the filing of the notice of appeal – and here it should again be mentioned that this occurred already in November 2016 – her attorneys of record engaged the first respondent's attorneys together with a representative of the first respondent in verbal settlement negotiations. It is clear from what is stated here by the applicant that she does not disclose to the court when this engagement commenced, and on how many occasions such an engagement occurred and that really no detail is given in this regard.

[11] In paragraph 11 of the founding papers, it is then stated that, following such verbal negotiations and on the 27th of July 2017, the first respondent directed a letter to applicant's legal practitioners requesting the terms of the settlement proposal to be reduced to writing. The relevant letter was annexed. This request was apparently communicated to the applicant, who took up to the 17th of November 2017 to submit such a draft. This draft proposal was then forwarded to the first respondent by a further letter dated 24 November 2017. Again, it is not apparent from the applicant's papers when the request made under cover of the letter of 27 July 2017 was communicated to the applicant, and why it took her from July to November 2017 to compile the requested settlement proposal.

[12] One would have expected such a settlement proposal to be compiled in a much shorter period of time, given the fact that the underlying dispute in this regard came all the way from 2007, in respect of which also proceedings, before the District Labour Court had occurred over many years.

[13] It is thus inexplicable why it took so long for the applicant to put together a draft.

[14] Again all this was not explained.

[15] After the submission of the settlement proposal - which apparently occurred

on 24 November 2017 - there were apparently further ongoing email exchanges and physical meetings between the applicant's attorneys of record and the first respondent's legal representatives – which yielded no concrete decision or communication as to whether the first respondent would even be amenable to her settlement proposals or not. It does not take much to detect that absolutely no detail is provided in this regard. The Court was not told or given any detail in regard to the so-called ongoing email exchanges and the alleged physical meetings. It is suggested that more than one meeting occurred but no detail is provided such as how many meetings occurred and when they occurred, who attended them, and what was for instance discussed and what were the respective outcomes. It is disclosed that no concrete decision or communication was made. But importantly, (for purposes of assessing what significance should be attached to this interlude), it is not even disclosed whether there was any progress and thus any purpose in these further negotiations.

[16] It is then that a huge jump in the time line occurs.

[17] In this regard it should be remembered that a settlement proposal was communicated on 24 November 2017 – and that in the interim apparently some unspecified and undetailed email exchanges and meetings had allegedly occurred – in respect it was communicated only – on 17 September 2019 – that is some two years later – that the first respondent would now not be amenable to the applicant's settlement proposal.

[18] Again, this extra- ordinary lapse of time is not really explained in any significant detail.

[19] The applicant then goes on to inform the court that following the futility of the settlement negotiations, which must have been communicated to her on or about the 17th of September 2019, her then legal practitioners of record withdrew their services.

[20] Again, the time lapse that occurred is simply glossed over. It was disclosed by the applicant during these court proceedings that the withdrawal actually occurred only sometime in March 2020. The communication and the letter annexed as "E"

was however already received on 17 September 2019. It is simply not explained what occurred in the period between September 2019 to March 2020. This is a further period of inactivity of approximately half a year.

[21] The court is then told that only on the 16th of June 2020 the Legal Aid Directorate issued instructions to FB Law Chambers to now represent her.

[22] During oral argument an explanation was made to the effect that the Covid pandemic played a role in this regard, in respect of which there was also a lockdown during the period end of March 2020 to the beginning of May 2020. This can be accepted as it is common knowledge and it is thus an aspect that the Court can take judicial notice of.

[23] The applicant goes on to state further in paragraph 17 of her founding papers that, following the legal aid appointment by FB Law Chambers, she consulted with her new attorneys to whom she submitted all the relevant documents in her possession, including five volumes of the record. Unfortunately, the applicant – again – does not take the court into her confidence when she does not disclose when she consulted with her attorneys and she does not even disclose when she submitted all the relevant documents, including the five volumes of the record, to FB Law Chambers. The applicant however received an opinion on the 29th of June, (the year is not given but I presume this would be in 2020), to the effect that her new lawyers were of the opinion that the District Labour Court's judgment would be appealable. This was apparently also drawn to the attention of the Legal Aid Directorate at some stage.

[24] Ultimately the founding papers go on to state that it was respectfully submitted that the delays, in applying to the Registrar for a date of the hearing, after receiving the respondent's notice of intention to oppose, was due to the promising settlement negotiations, which raised the hopes that the matter will be settled amicably. The applicant then went on to address the prospects of success.

[25] It was so disclosed to the court that new legal practitioners were appointed on the 16th of June 2020 and that they even formed an opinion that the District Labour Court's judgment would be appealable. The applicant's papers are however silent in

regard to the advice which she must have received in regard to the lapsed appeal, or the advice that she did not receive in this regard. It is clear however that it can be inferred that she must have received such advice sometime after the 16th of June 2020 as the present application for reinstatement was subsequently launched.

[26] As an application for the reinstatement of an appeal presupposes that an appeal has lapsed, it can thus be inferred that, at that stage at least, the applicant must have been advised that her appeal had lapsed and required reinstatement. Such advice, in all probability, also must have included advice as to when the appeal that was noted as far back as 2016, in actual fact, had lapsed. It remains inexplicable, why the application for reinstatement was in such circumstances then only launched on 24 July 2020, given such realisation. Once again there was no promptness or urgency of action following the realisation that the reinstatement of the lapsed appeal was required. All these aspects are not fully and properly explained in the applicant's founding papers. It must be concluded further on that basis already that the applicant did not fully take the court into her confidence.

The grounds of opposition

[27] The application was opposed, and it appears from the answering affidavits, in addition to the points *in limine,* to which I will briefly return, that the main grounds of opposition advanced on behalf of the respondent were to the effect that the applicant had not shown sufficient cause to warrant condonation, that no full, detailed and accurate explanation had been provided by the applicant for the inordinate delay in lodging her application for reinstatement and condonation in general, in particular as there are periods of more than one year that went unexplained. It was pointed out that the applicant importantly did not state when it came to her knowledge that her purported appeal had lapsed, that the applicant did not state in terms of what rules her application for reinstatement and condonation was brought and also that no confirmatory affidavit by her then attorney of record, Mr Tjitemisa, had been attached in support of her case.

[28] I will just briefly deal with the last mentioned aspect. It appears indeed from the record that it is correct that no affidavit, or supporting affidavit, or confirmatory affidavit of Mr Tjitemisa was annexed to the applicant's papers. In this regard certain

submissions were made subsequently at the hearing which pointed out that, in the absence of any such affidavit, certain allegations relating to Mr Tjitemisa, made in the founding papers, constitute hearsay evidence. These arguments have some validity, but I believe that they will not be crucial to the determination of this matter.

[29] It is also correct that further legitimate criticism was levelled against the applicant's papers where reliance was placed on the current Rules of the Labour Court 2007, in circumstances where it is actually clear, to all, that this particular case, which emanates from the previous labour dispensation, is thus governed by the applicable transitional provisions set in Schedule 1 as read with Section 142(1) of the current Labour Act – and because of which the current rules thus do not find application in this case.

[30] It is further also correct that certain legitimate criticism could thus be levelled at the relief formulated in paragraphs two, three and four of the notice of motion, which clearly referred to inapplicable rules and Practice Directions.

[31] Be that as it may, ultimately it was always clear that what the applicant seeks is reinstatement of her appeal and that, in that context, some condonation would be required, whether this would be in accordance with the currently applicable rules to the prosecution of appeals or those prevailing under the previous dispensation.

[32] When it so comes to the consideration of the other grounds of opposition it is firstly clear - and also of cardinal importance for the applicant's case - that the applicant simply does not state when it came to her knowledge that this appeal had lapsed.

[33] I have already addressed the aspect that most certainly this must have been drawn to her attention - and that she must have received advice in this regard - from FB Law Chambers, during the period June to July 2020. It is however not disclosed at all whether Mr Tjitemisa, the applicant's previous legal practitioner, who had been engaged to prosecute the appeal in the first place, rendered any advice to the applicant in this regard. The applicant simply fails to take the court into her confidence and from which an adverse inference must be drawn. This non-disclosure is a material factor that weighs negatively against the applicant, because

it is cardinal to the determination of whether or not the court should grant the sought condonation as the court should have been told what the applicant knew or did not know. She was most certainly legally represented at the time of the noting of the appeal, at the time when the appeal lapsed and throughout until about March 2020. It is unlikely that the applicant at no stage was advised that her appeal had lapsed.

[34] The next point which was raised forcefully is that no full, detailed and accurate explanation was offered by the applicant for the inordinate delay in lodging her application for reinstatement. My simple analysis of the founding papers and what is stated therein – or rather what is not stated therein – already bears out that this ground of opposition has merit.

[35] It is clear from the authorities that an application for the reinstatement, just like an application for condonation, should be made at the earliest possible opportunity and with promptitude, an aspect which had also been pointed out in the answering papers. The fact that an application- or that applications of this nature - are inordinately delayed, weighs heavily against the granting of condonation.

[36] It is also clear – and this can be stated at this stage already – and if one has regard to the applicant's own case, regardless of whether or not that case is weakened by certain hearsay allegations – that the applicant centrally attempts to justify what is glaringly an inordinate delay – through the ongoing fruitless settlement negotiations, which spanned over a number of years subsequent to the noted appeal. The applicant and her legal practitioner afforded themselves the luxury to negotiate at length and at leisure. This was done knowingly and wilfully given the likelihood that the applicant and her legal practitioner must all along have been aware that they had allowed the noted appeal to lapse in the meantime and regardless of the consequences that could follow, should the required reinstatement not be applied for promptly.

[37] The aspects which have already been addressed herein are already indicative of the fact that the sought condonation should not be granted.

[38] It should however also be mentioned, in completeness, that two further points in *limine* were raised on behalf of the applicant. They related to the question

whether or not the appeal had been noted 'effectively'. This point was mounted on the particular case number that was apparently assigned to this appeal as a result of which it was contended that this appeal was not properly registered.

[39] Mr Van Greunen who argued the matter on behalf of the first respondent, endeavoured to argue this point and also that the wrong references to wrong rules of court had created certain deficiencies in the applicant's case. Subsequently he did not press these points further, particularly once the court had pointed out that it was not the applicant's duty to assign a case number to the appeal that had been noted on her behalf, which number was apparently assigned by the registrar's staff to this case and which surprisingly perpetuated the case number that had been assigned in the District Labour Court. It was also clear from the facts of the matter that some registration did in fact occur, and in respect of which there was also a notice of appeal which had been filed and where the record, which had been misplaced and then found again and where it was common cause that the record is now in existence and available. Most importantly both parties also failed to advise the court precisely in what respects the Office of the Registrar did not comply with the previous applicable rules that should have been followed once an appeal had been registered.

[40] The second point in *limine* I have already considered and briefly dealt with above and in respect of which I indicated that I believe no real prejudice attaches in this instance to the applicant's wrong reference to the wrong rules, as, essentially, it must have been clear all along that what was brought by the applicant was an application for the reinstatement of the appeal, which implied also the sought condonation for the non-compliance with the relevant rules of court.

[41] During the hearing Mr Van Greunen on behalf of the first respondent more importantly submitted that the applicant had failed to satisfy the applicable principles pertaining to reinstatement. He pointed out that the applicant bore the onus in this regard, and he again pointed out that no full and acceptable explanation had been provided for the default and the inordinate delay, in respect of which the entire period was not properly explained and where the application was not launched with reasonable promptitude. He pointed out in addition that the stage will come where a party can no longer hide behind his or her legal practitioner's negligence, particularly

where the non-compliance was gross and flagrant as it was in this case.

[42] He addressed the aspect of hearsay, and with reference to the content of the letter of 15 June 2017 he submitted that it was apparent that, contrary to the allegations made by the applicant in her founding papers, there had not been any negotiations between the parties, for the period February to 15 June 2017, as that letter disclosed that Mr Tjitemisa only enquired in June 2017 whether the first respondent would from then onwards be prepared to engage in settlement negotiations. He highlighted that it thereafter took some four months to compile such proposal, that it then took a further 22 months, of meetings and emails which were not substantiated, and which where unspecified negotiations, until eventually a letter was written in January 2018, asking for a reply. It was submitted that the applicant's and her legal practitioners sat back throughout this period and waited for a response, knowing that there was an appeal that had to be prosecuted. He submitted further that it was not apparent or disclosed why Mr Tjitemisa had terminated his services, which was some nine months after the settlement negotiations had broken down. Again he pointed out that no explanation had been provided. He thus essentially submitted that in the absence of a full and clear explanation no cause for condonation was shown. He submitted in regard to the prospects of success that there were no such prospects and that the application should be dismissed.

<u>The applicant's argument</u>

[43] The applicant who appeared in person, as I have mentioned before, firstly endeavoured to recount the factual history of this dispute. It soon became clear that this history was set out with reference to what she had put into her heads of argument, which history was however not contained in her affidavits. On numerous occasions she went outside the four corners of the affidavits. She informed the court of a very unfortunate situation where Mr Bangamwabo apparently wrote a letter to Mr Tjitemisa requesting him to explain the delay that quite obviously had occurred in this matter, and, to which no response was received. Also this was not contained in her papers.

[44] The applicant repeatedly reminded the court that she was a lay person, not *au fait* with the legal proceedings and the applicable substantive and procedural law.

She begged the court to hear her case, which was a case in which she had been abandoned by her legal practitioners, and where she stated that this was akin to 'an child who had been abandoned'. Interestingly enough, in the realisation of- and obviously after hearing argument on this aspect from the respondent's legal practitioner, she now indicated that she had kept a diary of all the activities that had occurred throughout the years, and particularly the activities that had apparently occurred subsequent to the noting of the appeal, and that she had handed this diary, as she called it, to Mr Bangamwabo, in order to assist him with the drafting of the application for reinstatement. She indicated repeatedly that she had done everything to move the case on together with her lawyer and that the court should condone her non-compliances. She stated that Mr Tjitemisa had been her lawyer for eleven years, and that she wanted to move on with her life and she thus required condonation also as she has a sick mother. She pleaded with the court to grant her the sought condonation.

[45] In reply Mr van Greunen pointed out that unfortunately the applicant had to stand or fall by her papers, and that she had been advised that, should she have wanted to adduce further facts, she should have applied for the supplementation of her papers, which opportunity she had not utilised.

[46] Mr van Greunen countered the submission in regard to the 'abandoned child', with a counter-citation apparent from a judgment from Mr Justice Masuku in *Keet v Etosha Fishing Corporation (*HC-MD-LAB-APP-AAA-2017/00018) [2018] NALCMD 33 (14 December 2018), where the learned Judge stated:

'[19] It must be mentioned that instituting of proceedings by a person is a very serious matter. <u>It is akin, in my view, to having a baby, who needs all the attention and succour until they reach an age where they can do for themselves.</u> In this regard, an applicant, appellant or plaintiff, has to make regular enquiries and take steps to ensure that the proceedings they have instituted are being brought closer to maturity and readiness for a hearing. A party like the applicant, who noted the appeal, albeit out of time, does nothing to follow up on the progress of the case, would be guilty of neglect and the court may not come to her assistance in those cases. *(my underlining)*

[20] Although I admit that the applicant is not a lawyer, she is also not a person who has no education at all. She appears to have some qualification in accounting, which renders her

a person who would understand what the consequences of neglecting an appeal, for whatever reason, are. There is no evidence that she approached the Labour Court Registrar to explain her dilemma and her desire to pursue her appeal. She simply says nothing about the prosecution of the appeal, nor the filing of the record and other steps required by the Act.'

[47] I will return to this quote.

[48] It was with reference to this citation that Mr van Greunen then submitted further that this court should not come to the applicant's assistance, and that it was not even explained that the appeal was ripe for hearing or that the record was in a proper and certified state and that the application should also fail as his client was entitled to finality in this case, which had been ongoing since 2016. The first respondent was clearly prejudiced by the applicant's negligence, so the argument went further.

[49] With reference to the applicant's submission in regard to the importance of the case for her, he argued that also this facet was not dealt with adequately in her papers. The same went for the argument that condonation should be granted in the interests of justice. The first respondent's legal practitioner further and finally pointed out that the applicant had been legally assisted until the close of pleadings and that her case had to be- and was made until then with assistance of Mr Bangamwabo and Mr Tjitemisa.

[50] [The applicant then requested an opportunity to respond to this argument and she was then allowed to indicate that the record was ready, and she also again expanded on her analogy that her case was 'akin to an abandoned child'.

[51] Finally the applicant utilised this further opportunity to read from the concluding paragraphs of her written submissions, in which she had included a quote from the judgment delivered in *Matuzee v Sihlahla* (LCA 2/2016) [2018] NALCMD 3 (15 March 2018) and also what was said in this regard further in *Elias v Bank of Namibia* (HC-MD- LAB-APP-AAA-2020/00043) [2020] NALCMD 30 (16 October 2020) with reference to which she then pleaded that the court should grant her the sought condonation for her to proceed, in order to enable the consideration of the

merits of this matter.

[52] It is important for the understanding of this case, and in spite of the repeated and emotional appeals, made by the applicant that she was a lay person, that the hard facts of the case show that she was essentially legally represented throughout at all material stages, until the latter part of the case, which merely included a case management- or two hearing, and oral argument. She was represented for some eleven years on her own version by Mr Tjitemisa, a senior practitioner of this court, and then by Mr Bangamwabo, who accepted the mandate and who drafted the papers which are serving before the court today. The applicant even received the subsequent benefit of legal representation from Metcalfe Beukes Attorneys, who then withdrew shortly after having accepting their mandate[1], essentially then leaving the applicant to argue the merits of the matter in person.

[53] It is thus not correct to say that the applicant is to be regarded as a lay litigant throughout. In fact she was legally represented for the major part of the proceedings, and importantly for the determination of this case, she was also legally represented, as it was put, until the close of pleadings. What was meant in this regard is that Mr Bangamwabo drafted the founding papers on behalf of the applicant in this application for reinstatement, he must have considered the answering papers filed on behalf of the first respondent, in order to then also draft the replying affidavits. All this was done with the assistance of a duly qualified and admitted legal practitioner.

[54] This is then also the important distinguishing feature to the case law that is relied upon by the applicant. It appears for instance from the *Matuzee* matter that the applicant there was unrepresented when he drafted the notice of appeal himself.[2] This is a far cry from the situation that serves before the court today and where the notice of appeal was not drafted by a lay person who was found wanting because of the obvious deficiencies in knowledge and qualification that a lay person will have. The same observations and considerations would apply also in respect of the relied upon *Bank of Namibia* case, which must also be distinguished on the facts.

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[1] One wonders why?

[2] Compare *Matuzee* op.cit. at [48].

[55] It is in any event in such circumstances immaterial for the greatest extent that, at the end of the road, the applicant had to draft her written submissions herself, which she commenced by stating that she is a lay person with no grain of knowledge of the law, let alone litigation skills, and from which it appears contradictorily that she is nevertheless capable of citing case law to this court. I therefore dared to question whether these introductory statements are really accurate and true. I thus questioned whether the applicant received assistance in this regard, but even if she did, it is clear to me that the applicant was an Agri Bank official, not at the lowest level, and that what Mr Justice Masuku said thus applies to her. Here it will be recalled that Mr Justice Masuku said in paragraph [20] of his said judgment and where also, like in his case, he found that the applicant before him was not a person who had no education at all. This is a further important distinction to be kept in mind. The applicant most certainly has given me the impression that she had the acute capability to understand the consequences of neglecting her appeal. And even if she did not, she was in any event in receipt of legal representation at the relevant time.

[56] Surely - and in circumstances where the applicant - despite her persistent cries that she is a lay person - although she has been legally represented for the greatest part of the relevant period of her case – and thus at all material times hereto – the normal relaxations, pertaining to lay persons, do not find application.

[57] This factor is in any event exacerbated by the fact that the applicant must have understood at all times – because this is an aspect that she hammered home repeatedly during argument – that this case was of great importance for her. The applicant must have understood this when she took her complaint to the District Labour Court, and she must have understood this at the time that the judgment in the District Labour Court was made. She must have understood this at the time that the appeal was noted. And then – all of a sudden – there is not a hint of urgency to prosecute an appeal further on which the Applicant's livelihood allegedly depended and still depends. This is inexplicable. This change of heart in my view was wilful and inexcusable for the reasons already given. Given the circumstances and the underlying facts of the matter one would have expected the applicant to make regular enquiries and take regular steps to ensure that her appeal be brought closer to a hearing and thus to conclusion. This was particularly so once the applicant was

faced with a Respondent that did not come to the negotiating table. Negotiations could, surely only be entertained within reasonable parameters. To negotiate for years on end without result or with no real advancement in the process, was seemingly nonsensical. Why, in such circumstances – and also to obtain movement in the negotiations - the appeal was not prosecuted vigorously – at a much earlier stage – escapes the mind.

[58] The applicant has throughout argument pointed the finger at her previous legal practitioners. In this regard it was however correctly pointed out that a litigant cannot hide behind the negligence or ineptitude of a legal practitioner if the default, the non-compliance, and the steps which should have been taken are 'gross' and 'flagrant', as it was put in argument. The applicant could have terminated the mandate, particularly that of Mr Tjitemisa, at a much earlier stage. In fact she could have done that at any stage and was always free in this regard. It is not apparent what went on behind the scenes and why the inactivity for extremely lengthy periods of time occurred or were tolerated, particularly given the assistance of a senior legal practitioner such as Mr Tjitemisa, who must have acutely known that he was dealing with- and was negotiating on a lapsed appeal. All this is also inexplicable.

[59] The fact of the matter however is that it appears to the court that this appeal was wilfully allowed to lapse, where allegedly protracted negotiations took place at risk, in the absence of a necessary application for reinstatement and where such negotiations seemingly were conducted at leisure, regardless of the risks and consequences and the impact of all this on the prospects of success as far as an application for reinstatement was concerned. The more time the applicant and her legal practitioner afforded themselves, the lesser the chances of success became. All this must have occurred in the acute knowledge- and regardless of the consequences that could attach to such conduct or rather lack of conduct.

[60] I thus have to conclude - that the default which occurred in this case - was wilful, in the sense that it was allowed to occur regardless of the consequence and also with complete indifference to any such consequences. What compounds all this is that the applicant and Mr Tjitemisa were free agents throughout. They were always free to have brought this application at a much sooner stage and yet they did not.

[61] It is with reference to all the facts and circumstances that have been addressed in this judgement, that it then must be concluded that the applicant's non-compliance with the applicable rules are 'glaring', 'flagrant' and 'inexplicable'. The applicant's default in this instance was not only egregious, but also wilful.

[62] In such circumstances this court is not obliged to consider the merits of the applicant's case as the Supreme Court has held in *South African Poultry Association and Others v Minister of Trade and Industry and Others* [3] that :

a. '[56] This court has made it clear that in condonation applications, where non-compliance with rules is found to be 'glaring', 'flagrant' and 'inexplicable', this court will not consider the prospects of success in determining the condonation application.[4] This court in *Krüger* [5] applied that principle to condonation applications in review applications. In *Krüger*, this court in effect upheld the approach of the High Court, in a case involving an extremely lengthy unexplained delay, that it would be entitled not to consider the merits in dismissing an application.[6] '

[63] In these premises it must then ultimately be concluded that the applicant has not made out a case for the sought reinstatement, and the application is accordingly dismissed.

H GEIER

Judge

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[3] *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

[4] *Arangies t/a AutoTech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Katjaimo v Katjaimo and Others* 2015 (2) NR 340 (SC) para 34; and *Tweya and Others v Herbert and Others* NASC SA 76/2014 (6 July 2016).

[5] *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC).

[6] At 174F – I.

PARTIES:

APPLICANT:	In Person
1st RESPONDENT:	W Van Greunen Köpplinger Boltman Legal Practitioners, Windhoek