REPORTABLE

CASE NO. SA 22/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ALEX MABUKU KAMWI **APPLICANT**

And

HANNELIE DUVENHAGE **FIRST RESPONDENT**

ETZOLD–DUVENHAGE LEGAL PRACTITIONERS **SECOND RESPONDENT**

Coram: MARITZ, J.A., CHOMBA A.J.A. et DAMASEB A.J.A.

Heard on: 2009-10-14
Delivered on: 2009-11-13

JUDGMENT

MARITZ, J.A.:

[1] This application, ultimately intended to obtain reinstatement of the applicant's appeal, is a sequel to an earlier order of this Court striking the appeal off the roll with costs. As is evident from the judgment (written by my Brother Chomba with whom my Brother Damaseb and I

concurred handed down on 24 November 2008), the Court made the order for three reasons: (a) The appeal had lapsed by operation of law[1] because the applicant had failed to enter into "good and sufficient security" for the respondents' costs in the appeal as required by Rule 8(2); (b) the appeal had lapsed[2] because the applicant had failed to file the record of appeal within the time period prescribed by Rule 5(5) and (c) the applicant had failed to file a correct and complete record of the proceedings in the Court *a quo* as contemplated by Rule 5(13) of the Rules of Court and did not apply for condonation. The nature and history of the proceedings; the order appealed against and a more extensive analysis of grounds and the authorities underlying the Court's conclusion appear from that judgment[3] and it is therefore not necessary to repeat them for purposes of this judgment.

[2] As part of its reasoning, the Court noted that the applicant would have to obtain condonation for his non-compliance with the Rules and reinstatement of the appeal should he wish to pursue it.[4] This, at least in part, is what the application is seeking - "in part" because in, what is

[1] C.f. Rule 8(3) read with Rule 5(5) of the Rules of Court.
[2] See: *Chairperson of the Immigration Selection Board v Frank,* NR 107 at D–E and *Channel Life Namibia (Pty) Ltd v Gudrun Otto*, Case No. SA 22/2007 (unreported) delivered in the Supreme Court on 15 August 2008 at par [39].
[3] Under the same case number.
[4] See par [28] of the judgment.

titled as an “Application for Condonation”, the applicant only prays that the late filing of a fresh notice of appeal be condoned; that the late filing of the record of appeal be condoned and that the appeal be reinstated - no condonation is being sought for the applicant’s non-compliance with the requirements of Rule 8(2) regarding security for the respondents' costs of appeal.

[3] Rule 8(2) reads:

> “(2) If the execution of a judgment is suspended pending appeal, the appellant shall, before lodging with the registrar copies of the record enter into good and sufficient security for the respondent’s costs of appeal, unless –
>
> (a) the respondent waives the right to security within 15 days of receipt of the appellant’s notice of appeal; or
>
> (b) the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant’s notice of appeal, or such longer period as that court on good cause shown may allow, releases the appellant wholly or partially from that obligation.”

It is common cause that execution of the judgment was suspended pending the appeal. It has also not been suggested that the respondents waived their right to security contemplated in paragraph (a), nor that the applicant applied to the High Court to be released from the obligation to enter into security under paragraph (b) of the sub-rule or that security has been entered into – either before the striking of the appeal or thereafter.

[4] The applicant claimed from the Bar at the hearing of the *in limine* objections to the appeal that he had not complied with the requirements of Rule 8(2) because he had been ignorant of its provisions.[5] Having been informed of the Rule, his obligations thereunder and the consequences of his failure to comply with it in the Court's earlier judgement, he now seeks to avoid the obligation to enter into security by relying on Rule 4(8). The sub-rule reads:

> "Whenever a person obtains leave to prosecute or defend an appeal *in forma pauperis*, he or she shall not be required to lodge security for the costs of the opposite party or to pay any fees of court."

[5] See paragraph [25] of the earlier judgment in this matter.

To that end, he gave notice in the Application for Condonation that he intended to apply from the Bar on the date of the hearing "in terms of the rules of the court for him to be granted leave to prosecute the appeal *in forma pauperis*". When the application for condonation was called, he immediately sought to move the *in forma pauperis*-application from the Bar. The respondents, represented by Ms Van Der Westhuizen, objected to this course of action. She contended with reference to Rule 4(2) that an application of that nature could only be made from the Bar if and when the respondents' consent had been obtained for the applicant to prosecute his appeal *in forma pauperis*. Such consent, she submitted, had nether been asked nor given. The applicant, in turn, countered that the respondents' inaction to his notice implied tacit consent; that he was entitled to move the application to prosecute his appeal as a pauper from the Bar and, in any event, that the Court should entertain and allow the application. This dispute may appear to be one of procedure but, in the absence of an application to condone the applicant's non-compliance with the requirements of Rule 8(2), the outcome thereof will ultimately bear on the substance of the applicant's claim for reinstatement in circumstances where he has failed to enter into security for the

respondents' costs in the appeal.

[5] Rule 4(2), on which the applicant relies, provides that an application for leave to prosecute or defend an appeal as a poor person –

> "may be made orally from the Bar at the hearing of the appeal, if the opposite party consents to the applicant proceeding *in forma pauperis*." (*emphasis added*)

The liberty of the applicant under the sub-rule to move a pauper-application orally from the Bar is qualified. The applicant may only proceed with the application in an informal manner "if" the opposite party's consent has been obtained for him or her to prosecute or defend the appeal as a pauper. The conjunctive "if" normally introduces a clause of condition or supposition and means "on condition that; given or granted that; in (the) case that; supposing that; on the supposition that".[6] Moreover, in the construction of the sub-rule as a whole, the condition introduced by the word "if" is a condition precedent: an oral application from the bar is only

[6] Compare: The Shorter Oxford English Dictionary on Historical Principles, 3rd ed., vol.1, p. 1018. See also: *Walker v Standard Bank of South Africa, Ltd*, 1923 AD 438 at 440 where Innes CJ equated the meaning of the word "provided" in a contract to "if" or "on condition that".

permissible if the requisite consent has been obtained. Until then, the option of an informal application under the sub-rule – as opposed to the more formal petition procedure - is simply not available. Notwithstanding the applicant's contentions to the contrary, this construction is so clear that the sub-rule only needs to be read for it to be apparent.

[6] Moreover, the context in which sub-rule (2) falls to be considered also reinforces this interpretation. Sub-rule (3) provides that, when the opposite party has not consented that the applicant may proceed *in forma pauperis,* the application must be made by means of a petition. Precisely what is expected of an applicant may be gathered from sub-rule (4): he or she may not lodge a petition with the registrar unless the opposite party "has been asked for, and has refused, his consent …". The underlying *ratio* for this requirement is apparent: Proceeding by way of petition is quite laborious. It requires full disclosure of the petitioner's financial position, a succinct and fair exposition of all information which would allow the Court to assess the prospects of success in the appeal, a verifying affidavit and, if for the prosecution of an appeal, certification by two counsel that the petitioner has reasonable prospects of success in the appeal and numerous other

attendances on transcription, copying, service, and the like. It also requires of the Court to commit its limited resources to process and consider the petition. If the opposing party, who arguably stands to lose most if the applicant is permitted to prosecute or defend the appeal as a pauper without the obligation to provide security, consents that he or she may so proceed, the Court may *prima facie* construe it as a concession that the applicant is indeed a poor person as contemplated in Rule 4(5) and has reasonable prospects of success in the appeal (c.f. Rule 4(6)). Hence, the need for the applicant to formally establish those requirements on petition and for the Judges of the Court to assess them in the context of petition proceedings is dispensed with. The procedure referred to in Rule 4(2) may then be followed and, having given his or her consent, it will no longer be open to the opposing party to claim that he or she has been prejudiced by the informal nature of the application, or if leave to prosecute or defend the appeal as a pauper is granted.

[7] With this construction in mind, I now turn to the applicant's contention that the Court should infer respondents' consent from their inaction to the notice which he had given in the application for condonation. “Quiescence is not necessarily acquiescence” and for

"conduct to constitute an acceptance (it) must be an unequivocal indication to the other party of such acceptance," Watermeyer CJ remarked in *Collen v Rietfontein Engineering Works*.[7] Generally, acquiescence - "a form of tacit consent"[8]- in matters of importance is not lightly inferred from a person's conduct.[9] Although silence may sometimes be regarded as consent "when it is one's duty to speak,"[10] such an inference is not justified on the facts of this application.

[8] Firstly, because the applicant did not ask for the respondents' consent as expressly contemplated by Rule 4(2): He simply gave notice of his intention to proceed with the pauper-application in an informal manner under Rule 4(2). In the absence of a request, the respondents did not have a duty to grant or withhold their consent. Secondly, because they did not fail to respond. Shortly after they had received the application for condonation - which included the notice - the respondents filed a Notice of Opposition and caused it to be served by the Deputy Sheriff on the applicant. The Notice to Oppose, reasonably construed, relates as much to the notification as it does to the other

[7] 1948 (1) SA 413 (A) at 422
[8] Per McCall J in *Safari Surf Shop CC v Heavywater and Others,* [1996] 4 All SA 316 (D) at 323i – j.
[9] C.f. *Central Authority v B*, 2009 (1) SA 624 (W) at 629B-C.
[10] Compare *Commaille v Steyn,* 1914 CPD 1100 at 1103

substantive relief mentioned in the application. For the applicant to infer the respondents' tacit consent to his intended application from the Bar is therefore without factual or legal substance and somewhat opportunistic, to say the least.

[9] I interpose here to note that, although sub-rule (2) contemplates that an application from the Bar may be made "at the hearing of an appeal", I have assumed in favour of the applicant – without deciding – that the Court may also permit an informal application to be made at the hearing of an application to reinstate an appeal which had been struck for want of security. Given the fact that the applicant is litigating in person, I have also considered whether the Court should not *mero motu* condone his failure to obtain the respondents' consent as a precondition to an informal application under sub rule (2) for the leave to prosecute his appeal as a poor person. I am mindful that when it comes to lay litigants, courts are disinclined to hold them "to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers."[11] For the reasons that follow, I do not consider it to be in the interests of justice to adopt such a course.

[11] See: *Xinwa v Volkswagen of SA (Pty) Ltd*, 2003 (4) SA 390 (CC) at 395C-E

[10] The applicant, it must be noted at the outset, refers to himself as "a qualified private investigator; paralegal professional; and a qualified legal adviser". To that extent, at least, the less exacting approach normally adopted by the courts to pleadings and proceedings involving lay litigants, must be qualified in his instance. His command and comprehension of the English language, as noted by my Brother Chomba at the hearing, is good. Having quoted from, relied on and expressly referred to Rule 4 in argument and various other proceedings preceding the hearing, he could not possibly claim that he was ignorant of its provisions. Yet, he did not ask the respondents' consent to prosecute his appeal *in forma pauperis*. He must have known full well that, without securing their consent, he should petition for leave to proceed in that manner. This too, he did not do. He must also have known that, to the extent that he had not complied with the procedures and time limits[12] prescribed in Rule 4, he should apply for condonation. He did not.

[11] Most importantly though, he must have realised that, even if the Court would condone his non-compliance with the prescribed procedures and time limits, it had to be satisfied that he meets the

[12] The petition should have been filed within 21 days after noting of the appeal. See: Rule 4(7)(b)

qualifying criteria for pauper assistance prescribed by Rule 4(5). Not any person may apply for leave to prosecute or defend an appeal *in forma pauperis*, only poor persons[13] may do so. Poverty should not be a bar to justice. It should not be allowed to deprive indigent persons with just causes or defences the opportunity to have them adjudicated. But, given the constitutional demand for equality[14] and the right all persons have to a fair trial[15], the Courts must seek to strike a fair balance between the measures set to accommodate poor litigants and the equally important rights of opposing parties to a just and fair adjudication of their cases. In an attempt to do so, the Rules of Court have been designed to allow for pauper proceedings; the Courts, drawing on an age-old tradition, impose on the goodwill and sense of social responsibility of their officers to accord legal representation without charge to those litigants who may wish to avail themselves thereof; opposing litigants are required to proceed with the litigation without the comfort of knowledge that, if successful, recovery of their costs has been secured and the Courts have dispensed with the payment of court fees. Given these measures and the imposing or potentially prejudicial impact they may have on the courts' resources,

[13] See: Rule 4(1) read with Rule 4(5).
[14] See: Article 10 of the Constitution.
[15] See: Article 12(1) of the Constitution.

on counsel and on other litigants, relief under pauper provisions is extended only within a narrow scope: to poor persons (as defined) whose causes or defences entertain reasonable prospects of success.

[12] The applicant made no effort to bring himself within the Rule's definition of a poor person. In the absence of respondents' consent, the applicant's failure to make a full and frank disclosure of his financial position as required by Rule 4(5), in effect deprives the Court of the opportunity to consider whether his is an appropriate case to allow pauper-proceedings. The applicant knew of these requirements and his failure to make full disclosure invites consideration of the possibility that he did not do so because he knew that he was possessed of property in excess of the values stipulated in the sub-rule.

[13] Nowhere in his otherwise lengthy affidavit does the applicant allege that he was (or is) unable to enter into security as required by Rule 8(2) or, if unable to do so, why he did not apply to be released wholly or partially from that obligation by the Court *a quo*.[16] Whilst admitting that he is seeking to use pauper-proceedings as a means to avoid his obligation to put up security, there is not a single factual

[16] See: Rule 8(2)(b).

averment in his affidavit to support his contention that he is entitled to orally apply from the Bar for leave to prosecute his appeal, if reinstated, *in forma pauperis* or, for that matter, that he is a poor person as contemplated in Rule 4 and, in the Court's discretion, should be allowed to do so.

[14] In the result, the applicant's informal pauper-application purportedly brought under Rule 4(2) cannot be entertained. Moreover, in the absence of a full disclosure of his financial position, he failed to establish any other basis upon which the Court, in the exercise of its discretion under Rule 18, may allow him to prosecute his appeal *in forma pauperis*. The applicant has also not shown any cause why he did not enter into security as required by rule 8(2) or why he should be released from that obligation. He did not even seek condonation of his failure. In short, he has not established any permissible legal basis upon which the effect of the Court's earlier finding (i.e. that his appeal had lapsed because of his non-compliance with Rule 8(2)) may be disturbed. It follows that, for want of security, his application to have the appeal reinstated must fail.

[15] Condonation for the late filing of the notice of appeal and of the

record of appeal is only sought as a means to an end: that being reinstatement of the appeal. The reinstatement sought cannot be granted for the reasons I have given. It will therefore serve no useful purpose to deal with the application to condone the applicant's failure to comply with the time limits prescribed by the Rules for the filing of a notice of appeal and the record of appeal.

[16] In the result, the following order is made:

(a) The application purportedly brought in terms of Rule 4(2) for leave to prosecute the applicant's appeal *in forma pauperis* is struck off the roll.

(b) The application to reinstate the applicant's appeal is refused.

(c) The applicant is ordered to pay the respondents' costs in the application.

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MARITZ, J.A.

I concur.

Chomba, A.J.A.

I concur.

Damaseb, A.J.A.

ON BEHALF OF THE APPLICANT:	In person
ON BEHALF OF THE RESPONDENT:	Ms. C.E. van der Westhuizen
Instructed by:	Kirsten & Company