REPORTABLE

CASE NO.: SA 87/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between

IMMANUEL SHILONGO **Applicant**

and

CHURCH COUNCIL OF THE EVANGELICAL

LUTHERAN CHURCH IN THE REPUBLIC OF NAMIBIA **Respondent**

Coram:	SHIVUTE CJ, MAINGA JA and MTAMBANENGWE AJA
Heard:	**13 June 2013**
Delivered:	**16 October 2013**

RULING ON APPLICATION FOR CONDONATION

SHIVUTE CJ (MAINGA JA and MTAMBANENGWE AJA concurring):

Background

[1] The background to this application for condonation is that the applicant (as plaintiff) instituted action in the High Court against the respondent (as defendant) in which he sought damages in the amount of N$300 000 and patrimonial loss in

the amount ofN$150 000 for the alleged defamatory statements made by the respondent in a circular published to the congregations of the Evangelical Lutheran Church in the Republic of Namibia (ELCRN). The applicant's claims were met with a special plea by the respondent, namely lack of standing to sue or to be sued in its own name.

[2] The parties agreed that the special plea should be decided first before the merits of the case are considered. The matter came before Unengu AJ who in his judgment delivered on 17 October 2011, upheld the special plea and dismissed the applicant's claim with costs. He held that the respondent was only a structure of the ELCRN. As such, it did not have the legal capacity to sue or to be sued in its own name and that rule 14(2) of the Rules of the High Court upon which the applicant had relied for citing the respondent was not of application, because the respondent was not an association as defined by rule 14(1).

[3] Evidently aggrieved by the decision of the High Court, the applicant appealed to this Court against the judgment of that court. Although the Notice of Appeal was filed on time, the applicant failed to file the record of proceedings within the period set out in rule 5(5)*(b)*of the Rules of the Supreme Court;failed to enter into good and sufficient security for the respondent's costs of the appeal before the record was lodged with the registrar as prescribed under rule 8(2);failed to inform the registrar that he had entered into good and satisfactory security as required by rule 8(3) of the Rules of this Court;neglected to seek an extension of the time within which to lodge the record of the proceedings as required by rule

5(6)*(b)*of the Rules of the Supreme Court, and finally failed to file his heads of argument not later than 21 days before the hearing as required by rule 11(1).

[4] Consequently, applicant filed an application for condonation,but only for the non-compliance with rule 5(5) and rule 11(1). No application for condonation for the failure to comply with the provisions of the remaining rulesmentioned above has been filed. The applicant has not applied for the reinstatement of the appeal either. Counsel for the applicant raised a curious point that it was not necessary to apply for the reinstatement of the appeal. This argument will be dealt with in detail below.

Incidences of applications for condonation in appeals in the Supreme Court

[5] Before I deal with the applications for condononation, I would like, once again, to express this Court's grave concern about the alarming wave of condonation applications for non-compliance with the rules of this Court in appeal matters. Virtually every appeal that I was involved in during the recent session of the Court was preceded by an application for condonation for the failure to comply with one or other rule of the Rules of Court. In all those appeal matters, valuable time and resources were spent on arguing preliminary issues relating to condonation instead of dealing with the merits of the appeals. In spite of observations in the past that the Court views the disregard of the rules in a serious light,[1]the situation continues unabated and the attitude of some legal practitioners appears to be that it is all well as long as an application for condonation will be made. Such attitude is unhelpful and is to be deprecated.

[1]For example, in *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) para 48;*Erica Beukes v SWABOU,* unreported, delivered on 5 November 2010; *Rainier Arangies t/a Auto Tech v Quick Build*, as yet unreported, delivered on 18 June 2013 para 4.

[6] As this Court has repeatedly stated, an application for condonation is not there for the asking or a mere formality nor is it a one-sided exercise. There are other interests involved, including the convenience of the court and the respondent's interest in the finality of the judgment. It is therefore of cardinal importance that practitioners who intend to practice at the Supreme Court and who are not familiar with its rules take time to study the rules and apply them correctly to turn the tide of applications for condonation that is seriously hampering the Court's ability to deal with the merits of appeals brought to it with attendant expedition. I turn then to consider the two applications, starting with the application for the late lodging of the record first.

Application for condonation for the late lodging of the record

[7] It is trite that in an application for condonation an applicant must give an explanation for non-compliance with the rules. If the non-compliance is time related, the explanation must cover the entire period.[2] The applicant must also show that the appeal enjoys good prospects of success, which aspect will be considered in the context of the application for condonation to the extent that a court is not precluded,by the facts of the case, from the consideration of that aspect of the application.

[8] As regards the application for condonation for the failure to lodge the record on time in this matter, it is to be noted that the notice of appeal was filed timeously on 14 November 2011.However, the record of appeal was filed only on 3 April

[2] See, for example, *Namib Plains Farming CC v Valencia Uranium (Pty) Ltd* 2011 (2) NR 469 para 24; *Swanepoel v Marais* 1992 NR 1 (HC).

2012 together with the bond of security as well as an application for condonation for the late filing of the record of appeal. In terms of rule 5(5)*(b)* of the Rules of the Supreme Court,an appellant must lodgewith the registrar the record of proceedings in the court appealed fromwithin three months of the date of the judgment or order appealed against. If he or she has failed to do so within the period prescribed under Rule 5(5), he or she must apply to the respondent or his or her legal practitioner for consent to an extension of the period within which to lodge the record and must give notice to the registrar that he or she has done so.[3]Furthermore, since the respondent has not waived its right to security nor was the applicant released from the obligation to provide security before lodging copies of the record, the applicant in this case should have entered into good and sufficient security for the respondent's costs of the appeal.[4]

[9] Moreover, when copies of the record were lodged with the registrar, the applicant should have informed the registrar in writing whether he or she had entered into security or had been released from such obligation.[5]None of these steps was taken by the applicant in this matter. Failure to inform the registrar accordingly within the period referred to in rule 5(5) is deemed to be failure to lodge the record of appeal in compliance with the requirements of that rule.The consequence of such failure or neglect is that the appeal lapses, which means that the appeal is deemed to be discontinued and may only be revived upon the grant of condonation for the non-compliance with the rules and the reinstatement of the appeal.[6]

[3]Rule 5(6)*(b).*
[4]Rule 8(2)
[5]Rule 8(3)
[6]*Ondjava Construction CC v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) para 2.

[10] The record of the proceedings was filed in this matter more than two and a half months late. As previously stated, the condonation application is only in respect of the late filing of the record of appeal and the heads of argument, but not for the non-compliance with the requirements of other Rules of Court detailed above.It is opportune then to consider next the explanation for the failure to lodge the record of appeal in the prescribed period.

[11] The affidavit explaining the late lodging of the record was deposed to by Mr Grobler, counsel who argued the matter on behalf of the applicant. The explanation is that Mr Grobler requested the then official transcribers, Soho Consulting CC,on 14 November 2011 to transcribe the record. It was shortly before the festive season. He enquired about progress on 16 January 2012 and was informed that the tapes were missing and the personnel were busy searching for them. He was thereafter informed on 7 February 2012 that the missing tapes had been found and that the record would be typed within a week. He then informed the respondent’s legal practitioners of this development on the same day and only then did he enquire from them what the amount of security would be. In spite of the undertaking by Soho Consulting CC to complete the record within a week, and further reminders in this regard, Mr Grobler only received the typed record on 28 March 2012. The applicant lodged the record and the bond of security as well as an application for condonation on 3 April 2012. This is the sum total of the explanation. On the other hand, the transcribers' certificate shows that the record was transcribed on 18 February 2012and proof-read on 22 February 2012. There is no explanation as to what happened during the period between 22

February 2012 and 28 March 2012 when Mr Grobler says he had received the record.

[12] In any event,Mr Van Vuuren, counsel for the respondent, is correct in submitting that in the absence of a confirmatory affidavit from a person or persons at Soho Consulting CC who had discussions with Mr Grobler regarding the preparation of the record,what Mr Grobler was allegedly told by such person or persons is inadmissible hearsay and as such should be ignored. Furthermore, considering that only 31 pages of the record of proceedings were typed (the rest of the pages being copies) and the certificate indicatedthat the typed portion of record of proceedings was ready more than a month before Mr. Grobler said he had received it, his explanation for the delay does not satisfy the requirement that where non-compliance with the rules is time related, the explanation must cover the entire periodand is clearly not sufficient.

[13] As regards the provision of security, counsel for the applicant argued in effect that the applicant was not required to seek condonation for the failure to enter into security. Counsel argued that since rule 8(3) read with rule 5(5) requires security to be lodged 'when copies of the record are lodged', the applicant hadcomplied substantially with the rule as the bond of security was filed on the same date the record was lodged. This contention cannot be correct. Rule 8(2) provides in effect that where the execution of a judgment is suspended pending appeal, security should be entered into *before* the lodging of the record unless the right to security has been waived or an appellant has been released from providing security. This was evidently not done. Rule 8(3) on the other hand impelsthe

appellant to inform the registrar in writing whether he or she has entered into security or has been released from that obligation. The applicant has not so informed the registrar either. What he did was simply to annex the bond of security to the application for condonation for the late lodging of the record.This is not what the rule requires. As such, it was evidently not complied with.

[14] Counsel for the applicant further submitted that the record was not filed out of time as the three months stated in rule 5(5)*(b)* only commences running once the record has been obtained by an appellant.For that reason, counsel went on to argue that it was not necessary for the application for condonation to be accompanied by an application for the reinstatement of the appeal. He proceeded to submit that the appellant's obligation to file the record arises only once the record has been made available to him or her by the official transcribers. The record not having been made available to the applicant in this case within three months of the date of judgment or order appealed against, the applicant's obligation to file same does not arise at all, so counsel argued. Counsel developed the argument by contending that an applicant cannot be held responsible for something that is impossible and as such his or her failure to file the record in those circumstances amounts to necessity. Counsel relied for this proposition on a criminal case dealing with the defence of necessity.

[15] This argument is perplexing to say the least. The rule states clearly from which date the three month period commences to run, namely the date of the judgment or order appealed against. There is no additional requirement in the rule that the three month period starts to run from the date that the record has been

made available to an appellant. Moreover, Mr Grobler's argument begs the question: if counsel genuinely believed that the applicant was within the time allowed to lodge the appeal record, why was it found necessary to make an application for condonation? No coherent answer could be provided when this question was put to counsel during arguments. An appellant is not relieved of the responsibility of ensuring that the record is complete and has been lodged in accordance with the rules of Court just because the official transcribers are responsible for compiling it.[7]

[16] An appellant is under an obligation to take active part in the compilation of the record so as to ensure that the record is complete and is ready to be lodged within the time limits imposed by the rules. This responsibility cannot be shifted on to official transcribers. The criminal law principle invoked by counsel for the applicant is a red herring and is of no application at all. As previously observed, the failure to lodge the record of appeal in compliance with the requirements of rule 5(5) and to inform the registrar of the position of security has the consequence that an appeal lapses. It has already been noted that a lapsed appeal can be revived only upon a successful application for condonation and reinstatement.[8]The argument advanced by counsel for the applicant on this point is clearly untenable and should be rejected.

Application for condonation for the late filing of heads of argument

[17] As mentioned before, the applicant has also filed a condonation application for the late filing of his heads of argument.Counsel for the respondent has

[7]*Channel Life Namibia (Pty) Ltd v Otto*para 47.
[8]See note 6 above.

indicated that this application was no longer opposed. This attitude on the part of the respondent is understandable considering that the respondent's heads of argument were also filed late and no application for condonation has been filed therefor. The applicant seemingly takes no issue with the late filing of the respondent's heads of argument. The failure to file the heads of argument has been satisfactorily explained on behalf of the applicant and in the absence of opposition to it, I would accordingly grant condonation therefor.

Conclusion

[18] The applicant in this matter has run foul of far too many rules of this Court. He was selective in his endeavour to explain the non-compliance with the rules: applying for condonation only in respect of the two transgressions of the rules while brushing the rest of the transgressions aside.The applicant's explanation for non-compliance with the rules of Court in respect of the failure to lodge the record of appeal timeously is entirely unsatisfactoryas it does not explain the entire period. Over and above that, his interpretation of the rules cannot be accepted. Even if the condonation application were to succeed, the applicant did not apply for the reinstatement of the appeal as he has advanced unorthodox submissions that are contrary to settled principles.The authorities setting out those principles were usefully summarised in the respondent's heads of argument. Indeed, counsel for the applicant candidly conceded that he had not read those cases.

[19] Viewed in its entirety, the applicant’s counsel handled this case without the requisite diligence and displayed a cavalier attitude towards the rules of court. The appeal having lapsed, the Court has not been asked to reinstate it and should be

loathe exercising unsolicited discretion. It is therefore my considered view that in the absence of an application for the reinstatement of the appeal, coupled with a flagrant non-compliance with the rules of Court, it is not necessary to deal with the prospects of success even though we have heard arguments thereon.I may add though that having heard full arguments on the issue, I am not in any eventpersuaded that there are good prospects of success on appeal. Counsel for the applicant did not even endeavour to address the prospects of success of the appeal in the application for condonation for the late lodging of the record. It was only after the issue was raised in the answering affidavit that the applicant sought, impermissibly, to address the matter in the reply. Even then, such attempt was confined to a single statement that the applicant's appeal enjoyed good prospects of success without disclosing the basis for such a bold assertion. The application for condonation for the late filing of the record of appeal ought therefore to be refused.

Order

[20] The following order is made:

1. The application for condonation for the late filing of heads of argument is granted.

2. The application for condonation for the late lodging of the record of appeal is refused with costs, such costs to include the costs of one instructed and one instructing counsel.

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SHIVUTE CJ

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MAINGA JA

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MTAMBANENGWE AJA

APPEARANCES

APPELLANT:	Z Grobler Instructed by Grobler & Co.
RESPONDENT:	A van Vuuren Instructed by LorentzAngula Inc.