REPORTABLE

CASE NO.: SA 23/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARIA SUSANNA KLEYNHANS	**APPELLANT**

and

CHAIRPERSON OF THE COUNCIL FOR THE MUNICIPALITY OF WALVIS BAY	**1ST RESPONDENT**
JOHANNES ABRAHAM BURGER	**2ND RESPONDENT**
MINISTER OF REGIONAL AND LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT	**3RD RESPONDENT**
BV INVESTMENTS 605 CC	**4TH RESPONDENT**

CORAM: MAINGA JA, STRYDOM AJA and MTAMBANENGWE AJA

Heard on: **19 March 2013**

Delivered on: **26 June 2013**

APPEAL JUDGMENT

MTAMBANENGWE AJA (MAINGA JA and STRYDOM AJA concurring)

[1] This appeal is against the whole judgment of Damaseb JP delivered in the High Court on 24 March 2011.

[2] In the application before the High Court, appellant sought the following relief:

> ‘1. Reviewing and setting aside the decision of the first respondent, as reflected in building permit issued on 18 March 2008, approving building plans in respect of erf 95 Langstrand (‘the property’);
>
> 2. Alternatively to paragraph 1 above, reviewing and setting aside the decision of the first respondent, as reflected in building permit issued on 30 May 2005, approving building plans in respect of the property;
>
> 3. Declaring that the construction of the dwelling houses on the property is in contravention of the first respondent’s town planning scheme;
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> 4. Directing the second respondent to demolish such dwelling houses, alternatively such portion thereof as may be necessary to comply with the provisions of the first respondent’s town planning scheme;
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> 5. Pending demolition and in any event, interdicting and restraining the second respondent from using or occupying, or causing or permitting to be used or occupied, the said dwelling houses.
>
> 6. Directing that the first respondent pay the costs of this application, jointly and severally with such other respondent who may oppose.
>
> 7. Granting further and/or alternative relief.’

[3] A number of points *in limine* were raised by first respondent and were decided by the Court. The most critical of these points concerned the question of unreasonable delay by the appellant (as applicant then) to launch the application. The Court *a quo* found that the delay was unreasonable and refused appellant’s

application for condonation of the same and, consequently, dismissed the application.

[4] At the hearing of this matter various applications for condonation of non-compliance with rules of this Court served before us and my brother Strydom AJA remarked that it was inevitable to come to the conclusion that very little attention was given to this important matter. An analysis of the founding affidavit and the supporting affidavit in the application for condonation and reinstatement of the appeal that was made on behalf of the appellant will amply illustrate that indeed very little attention to the rules was given in this matter. I proceed to do so.

[5] Before embarking on that analysis, I think it is necessary to refer to some authorities regarding what a legal practitioner instructed to note an appeal is expected to do, and about the consequences of the failure to observe or breaches of the rules.

[6] In *Ferreira v Ntshingila* 1990 (4) SA 271 (A), Friedman AJA said at 281G:

> ‘An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A-B. Inasmuch as an applicant for condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays have occurred.’

The Learned Acting Judge of Appeal went on to say at 281J-282A:

> 'As far as the prospects of success on appeal are concerned, the appeal in the present case would not appear to be without merit. However, where the non-observance of the Rules has been as flagrant and as gross as in the present case the application should not be granted, whatever the prospects of success might be. See *P E Bosman Transport Works Committee and Others v Piet Bosman Transport* (Pty) Ltd 1980 (4) SA 794 (A) at 799; *Rennie v Kamby Farms (Pty) Ltd*1989 (2) SA 124 (A)at 131I–J.'

[7] In *Aymac CC and Another v Widgerow* 2009 (6) SA 433 (W) gross ignorance by the attorney of the rules governing the appeal was shown; the Court (Gautschi AJ) stated at 450H-I:

> '[36] . . . An attorney is not expected to know all the rules, but a diligent attorney will ensure that he researches, or causes to be researched (by counsel if necessary), the rules which are relevant to the procedure he is about to tackle. And if he discovers at some stage that he has been mistaken or remiss, then it is doubly necessary that he study the rules carefully in order to ensure that further mistakes are not made, and that those that have been made are rectified. This is the least one expects of a diligent attorney.'

And at 451-452A:

> '[39] Culpable inactivity or ignorance of the rules by the attorney has in a number of cases been held to be an insufficient ground for the grant of condonation. See *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121C -122C. The principle established by these cases is that the cumulative effect of factors relating to breaches of the rules by the attorney may be

such as to render the application for condonation unworthy of consideration, regardless of the merits of the appeal.'

[8] In my opinion, the above principles must apply *mutatis mutandis* to the present matter. At page 452C para [40] in the *Aymac CC* case, *supra,* the Acting Judge remarked:

'[40] There is a further reason why the court should not grant condonation or reinstatement in the face of gross breaches of the rules. Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363A where Holmes JA said the following concerning the late filing of a notice of appeal:

"The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment - the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn* 1912 AD 181 at p. 193, in which SOLOMON, J.A., said:

'After all the object of the Rule is to put an end to litigation and to let parties know where they stand.' " '

[9] I proceed to analyse what happened in this matter and the explanation for the many mistakes and/or omissions made by the legal practitioners that acted on behalf of the appellant,namely, the local legal practitioner of record for the appellantand the instructing legal practitioner under the name and style of Kinghorn Associates. The latter is the original instructed legal practitioner of appellant practising at Swakopmund, while the former is the Windhoek correspondent of the latter. The former swore the founding affidavit while the latter

swore the supporting affidavit in the condonation and reinstatement application (the main or first application).

[10] I refer to the main or first application because two applications were filed, the first on 24 July 2012 and the other on 16 August 2012; the reason therefor is not apparent. However, nothing turns on that fact; what is important is that both applications are wrongly titled as application in terms of Rule 12, and condonation is prayed for:

> '1. The non-compliance of Rule 8 and 9 of the Supreme Court Rules.'

This shows that little, if any, attention was paid to the rules, as my brother Strydom AJA pointed out at the hearing; rule 12 in terms of which the applications are brought was a rule of the South African Appellate Division. The rule in terms of which condonation can be asked for in our jurisdiction is of course Rule 18. The mistake was repeatedly made and still appears in the heading of the index which was amended as late as 19 March 2013. Had either legal practitioner in this matter read the rules they would not have failed to notice the obvious mistakes they were making.It seems they proceeded with the attitude that any mistakes made did not matter as long as one could later apply for condonation.

[11] The application(s) for condonation and reinstatement were brought only after the local legal practitioner had advice from her correspondentwho advised her to seek advice from the counsel then apparently acting for the appellant. That advice was received on 26 June 2012 and after a consultation with the said

counsel ‘on the way forward’. According to her founding affidavit the said advice and consultation led to the lodging of the application. It is clear from the papers that the application when lodged because of a realisation, *inter alia*, that:

1. Rule 5(6)(*b*) had not been fully complied with in that only one of the legal practitioners Mr Metcalfe representing the respondent had consented to the extension of the filing of the record to 18 July 2011, and the registrar of the Supreme Court had not been given notice in writing of the application for extension.

2. The bonds of security for the costs of the respondents had been filed at the High Court instead of the Supreme Court which she was later advised ‘is a material defect in the process and that condonation would be required.’

3. The bonds of security had not been lodged in accordance with rule 8(3) which provides:

> ‘(3) if the execution of a judgment is suspended pending appeal, the appellant shall, when copies of the record are lodged with the registrar, inform the registrar in writing whether he or she–
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> (a) has entered into security in terms of this rule; or
>
> (b) has been released from the obligation, either by virtue of waiver by the respondent or release by the Court appealed from, as contemplated in subrule (2),

> and in failure to inform the registrar accordingly within the period referred to in rule 5(5) shall be deemed to be failure to comply with the provisions of that rule.'

[12] For the sake of completeness I repeat herebelow the provisions of other relevant rules in this regard,namely, rule 8(2), rule 5(5) and rule 5(6). Rule 8(2) provides:

> '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.'

Rule 5(5) provides:

> 'After an appeal has been noted in a civil case the appellant shall, subject . . .
>
> (a) …
>
> (b) in all other cases within three months of the date of the judgment or order appealed against or, . . .
>
> (c) within such further period as may be agreed to in writing by the respondent,

> lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary: Provided that -
>
> (i) …
>
> (ii) …'

Rule 5(6)(*b*) provides:

> 'If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her attorney for consent to an extension thereof and given notice to the registrar that he or she has so applied, he or she shall be deemed to have withdrawn his or her appeal.'

[13] It will be noted that the supporting affidavit repeatedly refers to rule 6(5)(*b*) (see paras 5.2, 5.3,6, 7, 8 and 11 thereof) which does not exist as far as our rules are concerned. This repeated mistaken reference to rule 6(5)(*b*) is made in the affidavit despite the assertion that in December 2011 she 'had occasion to peruse the file as part of the routine in my practice' when she 'then noticed that the bonds of security had been filed in the High Court instead of the Supreme Court'. She was not in a position to give any explanation for her lack of attention to the rules, or her casual or lackadaisical attentionthereto.

[14] In paragraph 6 of her affidavit, she seeks condonation having realised that her notices 'in terms of rule 6(5)(b) were flawed'. In the same paragraph she pleads being under 'severe pressure of work as a number of matters came to a head at the same time requiring urgent attention'. Whatever pressure of work she

might have been under does not explain why agreements with respondents were not made timeously to comply with the requirements of rule 8(3). In paragraphs 8 and 9 of her affidavit the local legal practitioner reveals her and the other legal practitioner's wrong interpretation of rule 8(3) when she states:

> '8. At the time my instructing legal practitioner and I sought an agreement with the legal practitioners for the respondents regarding the security for costs, we were both under the impression that we had a two month extension interms of the provisions of Rule 6(5)(b) for the filing of the record and thatthis extension applied to the period within which security had to be lodged as well.
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> 9. At the time, Mr Hamman and I also did not see the filing of security for costs after the filing of the record as a problem because we interpreted rule 8(3) read with rule 5(5)(c) of the rules of this honourable court as allowingfor that, in the light of the agreement reached between Mr Hamman and the opposing legal practitioners.' My emphasis.

A reading of rule 5(5)(*c*) together with rules 8(3) and 5(6)(*b*) clearly shows that an extension of the period within which to file the record of proceedings can only be achieved through an agreement with the respondent parties and cannot be granted by the registrar. Notice to the registrar merely suspends the lapsing until an answer has been obtained from the respondent parties. If they refuse to agree that is the end of the matter and an application for condonation would be necessary. In this instance further extension of the period was immediately refused by Mr Metcalfe. Under the circumstances the explanation given by appellant's legal practitioners, that they were under the impression that they had a further twomonths to deal with the issue of security before the lapsing of the appeal, is unacceptable and again demonstrates the practitioners' ignorance of the relevant

rules. In any event the notices given to the registrar in which a further two months extension was requested were also flawed.

[15] Suffice it to say that in his supporting affidavit the instructing legal practitioner who states that he ‘read the founding affidavit and confirms the content thereof …’ clearly associates himself with the mistakes his colleague committed. In other words, he also reveals a casual or lackadaisical attention or lack of attention to the rules. Realising this, he on a number of occasionssought condonation of the mistakes made or omissions committed.

[16] To crown it all, some few days before the hearing of this matter another notice of application for condonation was filed on 14 March 2013 and brought to our attention on the day of hearing. This time the condonation is craved for failure to comply with a simple but mandatory rule for this Court, rule 5(1). The local legal practitioner says she only discovered the omission to lodge the notice of appeal with the registrar of the High Court when she read the heads of argument of the first respondent. These were filed and served on 4 March 2013. It still took her up to 14 March to make the application. I find the explanation offered unacceptable, that the omission was due to the fact that counsel who prepared the notice of appeal ‘inadvertently failed to include the Registrar of the High Court amongst the addresses’. Rule 5(1) is the first rule that a legal practitioner instructed to note an appeal should pay attention. The lack of attention in this regard is completely inexcusable.

[17] In the *PE Bosman Transport Committee* matter, *supra*, Muller JA found that no need to express any opinion on the merits and proceeded to say at 799D:

> 'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.'

And at 799H:

> 'In the present case the breaches of the Rules were of such a nature, and the explanation offered in many respects so unacceptable or wanting that, even if virtually all the blame can be attributed to the applicants' attorneys, condonation ought not, in my view, to be granted.'

I take a similar view of the breaches and explanations in the present case.

[18] Mr Rosenberg SC who appeared on behalf of the appellant could not offer any explanation of the breaches such as could affect my view of the matter; he accordingly focused most of his argument both in his written heads of argument and his oral submissions before us on the prospects of success. In the circumstances there is no need to express any opinion thereon.

[19] For these reasons I make the following order:

> The application for condonation of various breaches of the rules of this Court is dismissed with costs, including the costs of one instructing counsel

and two instructed counsel and the appeal is accordingly struck from the roll.

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MTAMBANENGWE AJA

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MAINGA JA

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STRYDOM AJA

APPEARANCES

APPELLANT:	Mr S P Rosenberg SC Instructed by Kirsten & Co Inc
1ST RESPONDENT:	Mr R D Cohrssen (with him Mr D Obbes) Instructed by Metcalfe Attorneys
2nd& 4th RESPONDENTS:	Mr C Mostert Instructed by Koep & Partners