REPORTABLE

CASE NO'S: SA 03/2014 and

SA 101/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HKL **Appellant**

and

MML **Respondent**

Coram: SHIVUTE CJ, DAMASEB, DCJ and SMUTS JA

Heard: **29 March 2016**

Delivered: **19 April 2016**

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] The respondent in this appeal instituted divorce proceedings as plaintiff against the appellant in May 2011. The appellant defended that action and also counterclaimed for a divorce. At issue between the parties was their matrimonial property regime. The respondent contended for a universal partnership whereas the appellant claimed that the parties were married out of community of property by virtue of s 17(6) of Proc 15 of 1928 (the Proclamation). The appellant also

disputed the control and custody of the minor children, maintenance and ancillary relief which the respondent had claimed.

[2] The matter proceeded to trial in June 2013 when all the evidence was led. Oral argument was heard on 11 July 2013 and on 23 September 2013, the respondent was granted a restitution order by the High Court. The appellant was ordered to return to or receive the plaintiff on or before 4 November 2013, failing which to show cause on 2 December 2013 why a final decree of divorce should not be granted and why the marriage between them should not be declared to be in community of property and why the control and custody of the minor children should not be awarded to the respondent and why the appellant should not pay maintenance in the sum of N$300 per month per child and pay the costs of suit.

[3] On 30 September 2013, the trial judge provided a detailed written judgment setting out his reasons for the restitution order which had been granted a week before. The court order at the conclusion of the written judgement differed from the terms of the rule which had been granted the previous week. The court made an order declaring that the marriage between the parties had been concluded in community of property as a substantive and separate order, and then as a separate order, set out the terms of the restitution order relating to the bonds of marriage, the control and custody of the minor children, maintenance, costs, and also requiring the appellant to pay 50% of educational expenses and ordering that certain minor children remain registered with the appellant's medical aid scheme.

Finally, the court below directed that the joint estate be divided equally between the parties.

[4] On the return date of 2 December 2013, the High Court granted a final decree of divorce in the opposed motion court as the appellant had not signified any intention to return to the respondent or in any way sought to resist the grant of a final order of divorce.

[5] During the proceedings in the High Court the appellant was represented by a legal practitioner. On 9 December 2013 his practitioner informed him by email that the final order had been granted. On 4 February 2014, a notice of appeal, curiously dated 5 February 2014, was served and filed. It sought to appeal against the whole of the judgment or order of 2 December 2013, which was said to have been granted by Ueitele, J. This notice was filed some 4 weeks outside the time limit prescribed in the rules of this court (as reckoned with reference to the date of the final order).

First condonation application

[6] The appellant states in his first condonation application that he provided the necessary funds to appeal to his legal practitioner in February 2014. The next date supplied by him in his affidavit is merely referred to as April 2014, when he heard from his legal practitioner that she had instructed counsel to prosecute the appeal and that he should travel from Katima Mulilo (where the appellant lives), for a consultation with counsel on 16 May 2014. The appellant states that he was

advised at the consultation that there were prospects of success on appeal and that he gave his instructions to his former legal practitioner to pursue the appeal to the end. But, he says, he did not get further feedback and on 13 October 2014 directed a complaint against the practitioner who was handling his case to the senior partner at the law firm. He further states that he also lodged a formal complaint against his erstwhile legal practitioner with the Legal Practitioners' Disciplinary Committee on the same date. He also states that he terminated his mandate on 19 October 2013 and thereafter instructed his current legal practitioner, although no date is supplied as to when precisely he did so.

[7] The appellant further states that his current legal practitioner in turn instructed counsel to prepare a condonation application. No date is given for this. He states that the record of the proceedings, correspondence and further documentation were perused and reviewed and research done and further consultations held in preparing his (first) condonation application which is dated 15 December 2014. It was served on 16 December 2014. A new notice of appeal was also filed. It had been realised that the High Court had determined the issue of the matrimonial property regime in its judgment of 30 September 2013 and that the final order of divorce had been granted in unopposed motion court by a different judge, Hoff, J. The new notice of appeal, dated 15 December 2014 was directed against the whole of the judgment given by Ueitele, J on 30 September 2013 and certain other orders confirmed by Hoff, J on 2 December 2013.

[8] The condonation application of 15 December 2014 then sought condonation for the late noting of the appeal as specified in the new notice of appeal alternatively condoning the late noting of the appeal on 14 February 2014 which appeal had subsequently lapsed. (Presumably reference was intended to the notice of appeal filed on 4 February 2014). An order reinstating the appeal was also sought.

Appellant's second condonation application

[9] The appeal was set down for 29 March 2016. On 1 March 2016, a further condonation application was filed on behalf of the appellant dated 29 February 2016. It referred to the previous condonation application. Some aspects were restated in summary form. It included the following statement:

> 'On 9 December 2013 Ms De Klerk (appellant's erstwhile legal practitioner) informed me by email that the High Court of Namibia has confirmed the *rule nisi* that was granted on 23 September 2013. It was at that time that I immediately gave instructions that she must note or pursue an appeal. At that time, I was only aware of the order dated 2 December 2013, hence my initial notice was only in respect of the order dated 2 December 2013. In the light of the circumstances, I seek condonation for my failure to file the record within three months after the judgment of the court *a quo* dated 30 September 2013.' *(sic)*

[10] The appellant further states (in his second condonation application) that as a result of the numerous orders, he did not realise at the time when his first condonation application was filed that the record (which was eventually filed in March 2015) had been out of time. He had not sought condonation for that non-compliance. It is not quite clear why the different dates of the orders should have

had any bearing on this issue as the record was only filed 20 March 2015 which was more than a few weeks late if the date of the final order were to be taken into account.

[11] It is further stated in the second application for condonation that the appellant's legal practitioner was informed on 14 December 2015 that the appeal would be heard on 29 March 2016. The appellant says that his legal practitioner's offices were already closed then for the December vacation and re-opened on an unspecified date in January 2016 when the services of counsel were sought. On 4 February 2016, counsel was retained to argue the appeal. The appellant further states that instructed counsel was however not available from 4 to 19 February 2016 to fully attend to this appeal. But he does go on to say that on 6 February, instructed counsel had unsurprisingly expressed the view that the record 'might have been filed out of time' and also sought a transcript of the proceedings on 11 July 2013. Counsel also requested confirmation that security had been duly filed and that a power of attorney had been lodged in accordance with the rules of this court. It also became apparent that the record had not been certified as is required by the rules.

[12] It was soon established that the proceedings on 11 July 2013, which are referred to in the court's judgment of 30 September 2013, only concerned oral argument. Nevertheless, those proceedings were transcribed and a separate bundle prepared and condonation sought for its late reception even though oral and written argument does not form part of the record a commonly held

misconception amongst legal practitioners. It was also established that security had been given on 23 March 2015 by way of a payment into court. But this had not been followed up by informing the Registrar that security had been given as is required by rule 8(3) of the rules of this court.

[13] It was also found that the appellant's power of attorney had not been filed. Forming part of the explanation for this yet further failure, the appellant states the following in his affidavit:

> 'At the time when this notice of appeal (of February 2014) was lodged I did not know that there was already a judgment of the court *a quo* delivered on 30 September 2013. It was only after I had instructed my current legal practitioner of record towards the end of 2014 that I came to know that there was such a judgment. I point out that there are three orders that were granted by the court *a quo*, namely of 23 September 2013, the order of 30 September 2013 and the order of 2 December 2013.'

In this paragraph, the appellant unequivocally reiterated his earlier statement quoted in paragraph 9 above that he was unaware of the judgment of 30 September 2013 when informed of the final order on 9 December 2013.

[14] As a result of these further failures which had been recently discovered by counsel, the second condonation application sought condonation for the late filing of the record of proceedings; the filing of an incomplete record – because heads of argument had not been included; the late filing of the appellant's power of attorney; non-compliance with rule 5(8) in respect of the certification of the record;

and non-compliance of rule 8(3)(*a*) (for failing to inform the Registrar that security had been given). Leave was also sought to supplement the record in respects already referred to and to provide the certification of the record. An order was also sought reinstating the appeal in the event of it being deemed to have lapsed.

Respondent's position

[15] The respondent's legal practitioner filed a notice to oppose the first condonation application in January 2015, but did not file any affidavit setting out the basis of opposition. Nor did the respondent's legal practitioner file heads of argument. He was however present in court when the appeal was heard and informed the court that he did not hold an instruction to appear but merely held a watching brief to observe the proceedings. He also stated that his client abided the decision of the court. He was unable to explain why he had not informed the court of his client's position prior to the hearing.

Submissions on appeal

[16] Mr Khama, who appeared for the appellant, submitted that the appellant had made out a case for condonation. He argued that a full explanation was made in both applications for the non-compliance with the rules identified in each application. He submitted that the types of defaults which had occurred were those which the appellant's legal practitioners should have addressed and that he could not have attended to those matters on his own as a lay person.

[17] During his address, the court referred Mr Khama to a letter attached to the first application which the appellant had on 19 December 2013 written to the senior partner of his erstwhile legal practitioner. In that letter, the appellant referred to various court dates which, he said, were not disclosed to him and which he had 'found out' himself. Included in the list was the court appearance of 30 September 2013 in respect of which he stated the following:

> '(A) provisional judgment was issued. No counter defense was made. This provisional judgment contained biased, twisted and in some instances false information which my lawyer could easily have refuted should she have been present.'

[18] Mr Khama was invited to explain how this could be reconciled with the appellant's statement in his second affidavit in support of the condonation application, quoted in paragraph 13 above, claiming ignorance of the judgment of 30 September 2013 until the end of 2014 as part of his explanation for his manifold failures to comply with the rules. Mr Khama submitted that there was no evidence before court which established that the appellant had actually seen the judgment before the end of 2014, as was contended by the appellant in his affidavit. When pressed on the issue, he argued that the letter of 19 December 2013 should be read and understood within its limited context – as a complaint about the legal services he had received. When further pressed, Mr Khama contended that it would be harsh to conclude that the appellant had been untruthful in his affidavit, and that, even if this court were to find that, mercy should be shown to the

appellant as the failures to comply with the rules had been the fault of his successive legal practitioners.

[19] Mr Khama also submitted that the merits strongly favoured the appellant. He argued that the respondent bore the onus to establish evidence that the parties had made a declaration as contemplated by s 17(6) of the Proclamation to the marriage officer. He insisted that evidential material to that effect had not been adduced and that the court below had erred in finding that there had been a declaration as contemplated by s 17(6).

[20] It is well settled that an applicant for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These firstly entail establishing a reasonable and acceptable explanation for the non-compliance with the rule(s) in question and secondly satisfying the court that there are reasonable prospects of success on appeal.

[21] This court recently usefully summarised the jurisprudence of this court on the subject of condonation applications in the following way:[1]

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

[1] *Arangies t/a Auto Tech v Quick Build* 2014(1) NR 187 (SC) para 5.

> "the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona fides* of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

> These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant and inexplicable.'[2]

[22] This court has on more than one occasion emphasised the frequency of failures to comply with the rules of this court and the consequent deleterious effects for the administration of justice.[3] The Chief Justice recently stressed in *Shilongo*:

> 'In spite of observations in the past that the court views the disregard of the rules in a serious light, 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 is made. Such attitude is unhelpful and is to be deprecated.'

> '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

[2]See *Beukes & another v SWA Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC 14 (5 November 2010) para 13; *Petrus v Roman Catholic Church Archdiocese* 2010(2) NR 637 (SC) para 9. See also *Balzer v Vries* 2015(2) NR 527 (SC) para 21.

[3]*Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432 (SC); *Shilongo v Church of the Evangelical Lutheran Church* 2014(1) NR 166 (SC).

> 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.'[4]

[23] This court has also repeatedly stressed that an applicant's explanation for the non-compliance must not only be 'full, detailed and accurate' but should also cover the entire period of non-compliance.[5]

<u>Application of principles to the facts</u>

[24] In the initial application for condonation, the applicant only sought condonation for the late filing of a new (and correctly formulated) notice of appeal (to replace the earlier inept attempt) almost a year after it was due. The earlier notice was also filed some weeks out of time – even if calculated from the date of the final order of divorce.

[25] The explanation provided in the initial application which only addressed the late filing of a notice of appeal did not provide any detail on a number of relevant issues and furthermore did not cover the entire period of the delay. The founding affidavit correctly accepted that the High Court's judgment of 30 September 2013 determined the question of the matrimonial property regime finally, despite the wording of the restitution order. The judgment also provided the court's reasoning

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[4] *Id* para (5) and para (6).

[5] *Shilongo* para (7).

for its orders. The date upon which the appellant became aware of that judgment is thus of relevance as to the steps that needed to be taken. But it is not provided. All that is stated in this context is:

> 'I further point out that I was also not informed and made aware by my legal practitioner that the court *a quo* had granted another order in a separate judgment delivered on 30 September 2013 in which the court ordered finally that our marriage was concluded in community of property.'

[26] The appellant further states that he was informed on 9 December 2013 by email that the rule granted on 23 September was confirmed (on 2 December 2013). No mention is made of the judgment of 30 September 2013 in this context. Nor is it again referred to. Significantly, the email of 9 December 2013 was not attached. No reason is given for its omission. It certainly should have been attached.

[27] The next date referred to is 4 February 2014, when the defective notice of appeal was filed some 4 weeks out of time. The only reason advanced why it was not filed straight after he had given instructions to appeal 'immediately' after receipt of the email of 9 December 2013, was that the appellant is a layperson. The form of those instructions is also not provided. A more likely reason for this delay appears in the following paragraph of the affidavit. The appellant proceeds to state there that he provided funds to his erstwhile lawyers in February 2014 to prosecute the appeal. No date is again given – another fact which could and should easily have been disclosed.

[28] There then follows an unexplained delay until an unspecified date in April when the appellant says he was informed to meet counsel on 16 May 2014 and his instructions to pursue the appeal were confirmed at that consultation.

[29] The next date disclosed in the affidavit is 13 October 2014, when the appellant addressed a letter to the senior partner of his erstwhile practitioners to complain of their services. A formal complaint against his erstwhile practitioner is lodged with the Disciplinary Committee on the same date. These complaints are attached.

[30] The complaint to the firm of practitioners had two annexures. Firstly there was a terse email addressed to the appellant by his former practitioner on 26 September 2014 expressing the view that his appeal lacked prospects of success, not referred to in the body of the affidavit. There was also an earlier letter of complaint attached dated 19 December 2013, also addressed to the senior partner. This letter not only included the extensive reference to the judgment of 30 September 2013 quoted in paragraph 17, but also referred to the 'appeal costs' being 'exorbitant'. The appellant had thus been advised of the costs of the appeal – presumably in the email of 9 December 2013 (or in another communication) - prior to 19 December 2013. This important fact is also not disclosed. This non-disclosure is significant as his former lawyers would presumably have (and should have) provided a deadline for payment if the lodging of the notice of appeal depended on prior payment. (The appellant does however disclose that he placed

his lawyers in funds ‘in February 2014’. His first notice of appeal was filed on 4 February 2014).

[31] The reference to the 30 September judgment in the letter of 19 December 2013 is further dealt with in connection with the second condonation application.

[32] The appellant states that he terminated the mandate of his former lawyers on 19 October 2014 and merely states that he ‘thereafter’ instructed his current lawyer. No subsequent date is referred to prior to the filing of the new notice of appeal and condonation application, both dated 15 December 2014. The appellant does however state that during this unspecified period of 2 months his current lawyer ‘perused and reviewed’ the record of proceedings in the court *a quo*, correspondence and unspecified ‘further documentation’. He also says that ‘research was done, further consultations took place, draft papers were prepared’. No dates are supplied for any of these activities except to say they took place during court term when instructed counsel was engaged in other matters.

[33] There was thus a lack of specifity and a failure to properly address lengthy periods of the delay. These unsatisfactory features were compounded by statements contained in the second condonation application and the manifold further non-compliances with the rules referred to in it.

[34] The failure to specify when the appellant had become aware of the judgment of 30 September 2013 was dealt with in the second application in the

quotation set out in para [13] above. Shortly stated, the appellant in late February 2016 unequivocally states that he was unaware of that judgment when the first notice of appeal was filed (in February 2014) as an explanation for its lateness. He further says that he only became aware of the judgment after instructing his current lawyers towards the end of 2014.

[35] These statements under oath are however categorically gainsaid by the appellant's contemporaneous correspondence of 19 December 2013.

[36] The appellant's indignation at the judgment expressed in his letter of 19 December 2013 clearly demonstrates knowledge on his part as to what was contained in the judgment which had been adverse to him.

[37] This knowledge clearly accords with the probabilities as his letter also discussed the costs of an appeal and further complains that 'High Court documents of September' had only been received by him on 21 November 2013. This latter statement was made in the context of the need he expressed to receive a document which would be a 'defence for the provisional judgment' (the term he used to describe the judgment of 30 September 2013).

[38] The express terms of this letter in its context make it very plain that the appellant was not only aware of the judgment but knew of its terms and felt the need to address it in December 2013.

[39] The subsequent self-serving statement in his affidavit in February 2016 denying any knowledge of the judgment until the end of 2014 to support his explanation for his delay is thus demonstrably false. The varying attempts by Mr Khama to explain away these fatally irreconcilable versions cannot avail the appellant. When the second application was prepared, it would seem it was realised that the appellant had not stated the crucial fact as to when and under what circumstances he had become aware of the High Court's judgment of 30 September 2013. Instead of truthfully stating the position, the appellant chose to mislead the court by providing a false version which he considered would best serve the explanation he proffered.

[40] As I have already made clear, the explanation given did not adequately extend to the entire period of the delays which in itself rendered it inadequate. The resort to a falsehood as to when he became aware of the judgment compounds the inadequacy of the explanation to the realm of dishonesty and bad faith. Plainly an application for condonation is to be in good faith. An untruthful statement used to explain a delay wholly negates that requirement. The applications for condonation would be dismissed on this basis alone, quite apart from the inadequacy of the explanation set out in the first application.

[41] But there are yet further reasons for the dismissal of the applications for condonation. The second application seeks condonation for several non-compliances with the rules – for the late filing of the record, its incompleteness, the late filing of the appellant's power of attorney, a failure to have the record certified

and a failure to inform the Registrar that security for the appeal had been given. Almost every rule setting out the steps to be taken to prosecute an appeal had been violated. The cumulative effect of these multiple non-compliances renders them so 'glaring', 'inexplicable' and 'flagrant', particularly when compounded by the resort to dishonesty in order to buttress a weak explanation, that this court will not consider the prospects of success in determining those applications. No view is thus expressed on the merits of the appeal.

[42] A word however, needs to be said concerning the repeated refrain running through appellant's counsel's argument that the appellant could not be blamed for many of the non-compliances which were rather caused by his former and current legal practitioners. Given the cumulative effect of the manifold non-compliances, the inadequacy of the explanation and the appellant's conduct of misleading the court, this argument can certainly not avail the appellant. But there are further reasons why this approach would not avail an appellant. As the Chief Justice made clear in *Shilongo*[6]*,* it is incumbent upon practitioners who undertake appellate work in this court to familiarise themselves with its rules and ensure that they are complied with. In this matter, it is stated that the current practitioner 'perused and reviewed the record and correspondence' and did research in late 2014. Yet despite all these attendances, for which no doubt a fee was charged, the five further failures to comply with almost every rule applicable up to that point in the prosecution of an appeal were not identified and addressed. This is to be deprecated and the frequent warnings of this court require implementation. As has

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[6]Id para 6.

been held[7] and repeatedly cited with approval in this court[8], there is a limit beyond which a litigant cannot escape the results of his legal practitioner's lack of diligence or the insufficiency of explanation, tendered. This is pre-eminently one such case.

[43] This follows that the applications for condonation must fail.

Costs

[44] Although the respondent was not represented in this court and elected to abide the decision of this court after initially filing a notice to oppose the first application for condonation in January 2015, there is no reason why the respondent should not be awarded costs up to that point.

Order

[45] The following order is made:

1. The applications for condonation and re-instatement of the appeal are dismissed with costs.

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[7]*Saloojee & another NO v Minister of Communication and Democracy* 1965(2) SA 135 (A).

[8]*Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013(3) NR 664 (SC) para 81; *De Villiers v Axiz Namibia (Pty) Ltd* 2010(1) NR 48 (SC) para 24; *Leweis v Sampoio* 2000 NR 186 (SC) at 193J.

2. The respondent's costs are confined to those up to filing the notice to oppose.

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SMUTS JA

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SHIVUTE CJ

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DAMASEB DCJ

APPEARANCES

APPELLANT:	D Khama Instructed by Chris Mayumbelo Legal Practitioners & Co.