



REPORTABLE

CASE NO: SA 33 / 2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ALBERTO GOMES FELISBERTO

Appellant

and

ALAN JOHN MEYER

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 17 March 2017

Delivered: 12 April 2017

Summary: Condonation application - non-compliance with the provisions of rules of court – rules 5(5), 8(2), 8(3) and 11(1).

Legal principles applicable restated. Condonation application must be lodged without delay and applicant must provide a full, detailed and accurate explanation for the delay.

Factors relevant in determining condonation application:

the extent of non-compliance, reasonableness of explanation offered, bona fides of the application, prospects of success on the merits of the case, importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by 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.

A court may decline to consider prospects of success on the merits of an appeal where non-compliance with the rules has been glaring, flagrant and inexplicable.

Cumulative effect of the non-compliance to be considered.

In casu – no acceptable explanation for some periods of delay and no explanation at all in respect of other periods of delay. Condonation application refused in spite of the possibility of prospects of success in respect of merits of appeal.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and FRANK AJA concurring):

[1] This is an appeal against a judgment of the court *a quo* per Miller AJ delivered on 14 March 2014 in terms of which judgment for damages in the amount of N\$25 000 was awarded in favour of the respondent based on a claim of malicious prosecution.

Condonation applications

[2] The appellant filed two condonation applications. The first application concerned the late filing of the transcribed record of the proceedings in the court *a quo* and an order for the re-instatement of the appeal. The second application relates to the late filing of appellant's heads of argument.

[3] In respect of the first application the facts are that the judgment of the court *a quo* was delivered on 14 March 2014, a notice of appeal was filed on 9 April 2014, and copies of the record of the proceedings in the court *a quo* were filed on 30 June 2014.

[4] In terms of the provisions of Rule 5(5)(b) of this court, after an appeal has been noted in a civil case, the appellant shall, within three months of the date of the judgment appealed against, lodge with the registrar four copies of the record of the proceedings in the court appealed from. Rule 5(6)(b) provides that 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. The record of the proceedings in the court *a quo* was filed two weeks late hence this condonation application.

[5] In his founding affidavit (deposed to by the instructing attorney, Mr Kwala) in support of the condonation application the following explanation for the late filing of the record was advanced.

[6] A certain Ms Gloria Situmbeko was employed as a professional assistant at Kwala and Company Incorporated and was tasked to deal with this appeal, as she had been involved during the proceedings in the trial in the court *a quo*, where she was assisted by an instructed counsel. After the notice of appeal had been filed Ms Situmbeko resigned and left the office at the end of April 2014.

[7] Mr Kwala stated that at that stage he was not aware that no effort had been made by Ms Situmbeko in order to have the proceedings in the court *a quo* transcribed and he had been under the impression that she had attended to it prior to her departure.

[8] Mr Kwala stated that after it came to his attention that no record of the proceedings had been received by his office he drew applicant's file on 20 June 2014

and discovered that the record had not been transcribed and he proceeded to instruct the transcribers to attend to it immediately.

[9] Mr Kwala stated that subsequently on 23 June 2014 he wrote a letter to respondent's attorney and requested an extension of the period for the filing of the transcribed record and received a reply on 26 June 2014. The request sought was refused.

[10] Mr Kwala conceded that he has been unable to attend to this appeal since the departure of Ms Situmbeko as this was occasioned by the fact that he is the only legal practitioner at his office and has unfortunately been occupied with trials in other matters. He further stated that he had been under the mistaken impression that the transcribed record of the proceedings had been sought and that it would only be a matter of time until the transcribed record would have been received by his office.

[11] Finally, Mr Kwala stated that there are reasonable prospects of success on the merits of this appeal since the trial court misdirected itself in a number of material respects as delineated in the notice of appeal.

[12] The second condonation application relates to the late filing of the heads of argument of the appellant. Rule 11(1) of the rules of this court provides that in every matter relating to appeals, the appellant or applicant shall, not later than 21 days before the hearing, lodge with the registrar four copies of the main heads of his or her argument together with a list of the authorities to be quoted in support of each head.

[13] Mr Kwala, in his affidavit in support of the condonation application, explained the delay as follows:

On 7 November 2016 a notice of set down of this appeal was forwarded from the registrar's office to their office but due to an oversight on their part they were able to instruct counsel to attend to the heads of argument only on 15 February 2017. Counsel subsequently informed his office that in terms of his calculations, heads of argument were due to be filed on 17 February 2017, and that it was insufficient notification for him to properly peruse the record and prepare heads of argument since he had also been engaged with other matters during the period in question. Counsel promised to finalise the heads of argument as soon as possible. The heads of argument were filed with the registrar on 27 February 2017.

[14] Mr Kwala stated that there was no deliberate delay in providing counsel with instructions, that there was an oversight in the allocation of the appeal date, and since counsel had previously been instructed to deal with the matter, they were under the impression that the date of the appeal had already been communicated to counsel.

[15] Mr Kwala stated that he was advised by counsel that it was unreasonable to have expected of counsel to finalise heads of argument with merely two days' notice. Finally, Mr Kwala repeated that there are reasonable prospects of success on appeal in respect of the merits.

[16] Another rule of this court which the appellant failed to comply with is rule 8. Rule 8(2) provides *inter alia* that if the execution of a judgment is suspended pending an appeal, the appellant shall, *before* lodging with the registrar copies of the record, enter into good and sufficient security for costs for the respondent's costs of appeal.

[17] A document titled 'Bond of Security' was filed with the registrar on 7 October 2014. It is apparent from this document that security was not filed before lodging with the registrar copies of the record as required by rule 8(2). The appellant also failed to comply with the provisions of rule 8(3).

[18] The registrar addressed a letter dated 15 March 2016 to Kwala and Company Inc. which reads as follows: (Quoted verbatim)

'2. The notice in respect of the bond of security was filed with our office on 7 October 2014. According to rule 8(3) failure to inform the registrar at the time that the copies of the appeal are lodged of the fact that the appellant has entered into security in terms of rule 8, or has been released from that obligation, constitutes non-compliance with rule 8(3). In terms of rule 8(3) non-compliance with that subrule also constitutes non-compliance with rule 5(5).

3. Taking into account the above and having read your application for condonation,¹ our office wishes to enquire:

“does the application for condonation address all non-compliances with the rules, ie is the failure to comply with the rule8(3) also addressed and if so at which paragraph?” ’

¹ A reference to the application for the late filing of the proceedings in the court *a quo*.

[19] Mr Kwala responded to the registrar's letter only on 11 May 2016 by filing a supplementary affidavit in which he conceded² that 'we should probably have expressly dealt with the issue relating to the non-compliance in terms of rule 8(3) of the rules of this Honourable Court, and do beg the Honourable Court's indulgence for this oversight in this regard. The oversight is regretted and should not have occurred.'

[20] Having conceded that the issue of security for costs had not been dealt with in the initial application for condonation, Mr Kwala strangely stated the following in paragraph 3.8 of the supplementary affidavit:

'I wish to reiterate the basis set out in the main application for condonation herein, and pray that same will be read and incorporated herein.'

[21] The fact remains that the issue of non-compliance with rule 8(3) was never dealt with in the initial (main) application for condonation thus nothing can be incorporated into his supplementary affidavit relating to the issue of security for costs.

[22] Further, it is common cause that rule 8(2) had not been complied with by the appellant and there is no application for condonation at all for such non-compliance.

[23] What is disturbing is that in spite of the fact that Mr Kwala's attention had been drawn to the failure to comply with the provisions of rule 8 by the letter of the registrar dated 15 March 2016, up until the hearing of this appeal on 17 March 2017 no

² In paragraph 3.2 of the letter.

substantive condonation application had been filed in respect of those non-compliances.³

Legal principles applicable in respect of condonation applications

[24] The approach by this court to condonation applications was summarised in the matter of *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F as follows:

[20] It is well settled that an application for condonation is required to meet two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay 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:

[5] 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 –

“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.”

³ Ie non-compliance with the provisions of rule 8(2) and 8(3).

“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”.⁴

[25] This court in *Tjekero Tweya & others v Eduard Herbert & others*⁵ referred with approval to the admonition to practitioners in *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) where the following appears at para 34:

[34] Sufficient warning has been given by this court that the non-compliance with its rules is hampering the work of the court. The rules of this court, regrettably, are often more honoured in the breach than in the observance. That is intolerable. The excuse that a practitioner did not understand the rules can no longer be allowed to pass without greater scrutiny. The time is fast approaching when this court will shut the door to a litigant for the unreasonable non-observance of the rules by his or her legal practitioner. After all, such a litigant may not be without recourse as he or she would in appropriate instances be able to institute a damages claim against the errant legal practitioner for their negligence under the Acquilian action. I wish to repeat what was said by O'Regan AJA in *Arangies*:

“There are times . . . where this court . . . will not consider the prospects of success in determining the application [for condonation] because the non-compliance with the rules has been “glaring”, “flagrant” and “inexplicable”.”
(Footnote excluded).

⁴ See also *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190 para 5; *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC 14(5 November 2010) para 13; *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (3) NR 664 (SC) para 68; *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) para 9.

⁵ Unreported judgment in case no. 76/2014 delivered on 6 July 2016.

[35] We hope that the cautionary observations made in this judgment will be taken seriously by all legal practitioners who practise in the Supreme Court. A legal practitioner has a duty to read the decided cases that emanate from the courts (both reported and unreported) and not simply grope around in the dark as seems to have become the norm for some legal practitioners, if judged by the explanations offered under oath in support of the condonation applications that come before the court.'

[26] The explanation provided in the first condonation application does not explain the reason for which Mr Kwala could have been under the impression that Ms Situmbeko had attended to the transcription of the proceedings prior to her departure. If this (ie that she had indeed requested the record to be transcribed) had been communicated to him, one would have expected a confirmatory affidavit by Ms Situmbeko. Even if she had been involved in the trial in the court *a quo* the failure to request the transcription of the trial proceedings remains unexplained. Further, it is not fully explained why no attention was given to this appeal for approximately two months after Ms Situmbeko had left her employment. Mr Kwala also does not explain the circumstances under which it was discovered that a transcription of the record of the proceedings in the court *a quo* had never been requested.

[27] The explanation provided for the delay in timeously filing the record of the proceedings with the registrar of this court as required by rule 5(5), is in my view, vague and does not constitute a reasonable and acceptable explanation for the delay.

[28] In respect of the explanation for the delay in timeously filing the heads of argument, it appears that the instructing attorney accepts that it was unreasonable to expect of counsel to finalise heads of argument within two days. The notice of set

down of this appeal was received as early as 7 November 2016. The 'oversight' to instruct counsel to timeously attend to the heads of argument is not explained at all. Merely to say that an oversight occurred, is in my view, an insufficient explanation. It is scant, lacks in particularity and evinces a lackadaisical approach to compliance with the rules of this court.

[29] As has been emphasised by this court in *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) practitioners of this court are expected to be diligent in the execution of their mandates.

[30] In respect of the non-compliance with rule 8(2) read with rule 8(3), there is simply no substantial condonation application at all before this court. This, on its own, is fatal to the condonation application. Mr Kwala conceded non-compliance in his supplementary affidavit. The failure to bring a condonation application for non-compliance with the provisions of rule 8(2) and rule 8(3) is inexcusable and flagrant, particularly in view of the fact that appellant had been forewarned of this non-compliance by the registrar about a year ago.

[31] The appellant's instructing attorney does not, in the applications for condonation, proclaim to have been unaware of the rules of this court and the requirements relating to the prosecution of an appeal.

[32] In *P.E. Bosman Transport v Piet Bosman Transport* 1980 (4) SA 794 (A) at 799D Muller JA stated the following:

'In a case of 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.'

[33] This passage is an accurate summary and on all fours with the present condonation applications.

[34] Mr Boesak, who appeared on behalf of the appellant in this matter, readily conceded the aforementioned passage as the correct approach in condonation applications, but nevertheless valiantly tried to convince this court to grant the condonation applications, emphasising good prospects of success on the merits of this appeal.

[35] In my view the cumulative effect of the non-compliance with the rules mentioned, renders the issue of prospects of success unworthy of consideration regardless the merits of this appeal. As was stated in *Arangies*, the non-compliance with the rules, as in the present case, had been 'glaring, flagrant and inexplicable'. The non-compliances with the rules were the result of the culpable inactivity on the part of the instructing attorney.

[36] In a written brief submission in respect of the condonation applications, counsel, on behalf of the appellant, pointed out the fact that no opposing affidavit had been filed by the respondent in respect of their opposition to the condonation

applications. Only a notice of intention to oppose the second condonation application was filed by the respondent.

[37] We were referred to a decision of this court⁶ in which it was held in a condonation application where a respondent is minded to oppose such an application he or she is required to file a notice to oppose, backed by an answering affidavit. It was held that the natural result of the failure to oppose an application in this manner was that the application was to be considered unopposed.

[38] This, however, does not assist the appellant in the present matter since an application for condonation is not just for the asking. The onus is on the applicant to convince the court there exists good cause for granting such application. The appellant on its own papers failed to meet this requisite.

[39] This court, in the circumstances of these condonation applications, and with reference to the authorities referred to, is therefore justified to dismiss the condonation applications without considering the prospects of success on the merits of the appeal.

[40] Ms van der Westhuizen who appeared on behalf of the respondent submitted that in the event of the dismissal of the applications, costs of this appeal should be granted in favour of the respondent on the basis of one instructing and one instructed counsel.

⁶ *Ugab Terrace Lodge CC v Damaraland Builders (CC)* (SA 51-2011) [2014] NASC (25 July 2014).

[41] In the result the following orders are made:

1. The condonation applications are dismissed.
2. The appeal is struck from the roll with costs, such costs to include costs of one instructing and one instructed counsel.

HOFF JA

MAINGA JA

FRANK AJA

APPEARANCES

APPELLANT:

A W Boesak

Instructed by Kwala & Company Inc., Windhoek

RESPONDENT:

C E van der Westhuizen

Instructed by Etzold – Duvenhage, Windhoek