



UNREPORTABLE

CASE NO: SA 31/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

LEVON NAMIBIA (PTY) LTD

Appellant

and

NEDBANK NAMIBIA LIMITED

Respondent

Coram: MAINGA JA, SMUTS JA and MOKGORO AJA

Heard: 4 June 2019

Delivered: 2 August 2019

Summary: This appeal deals with the failure of the plaintiff to comply with the court *a quo*'s pre-trial order relating to the filing of witness statements in preparation for the trial and to timeously apply for a postponement when it had not done so. Plaintiff failed to comply with the filing of the witness statements on three occasions despite the court *a quo*'s indulgence. Defendant's legal practitioner communicated with plaintiff's legal practitioner on 1 March 2017, some six weeks before the trial, regarding their non-compliance, however plaintiff was not forthcoming. On 7 March 2017, defendant filed a status report to the court *a quo* informing the managing judge of plaintiff's failure to file its witness statements in

the face of a looming set down of the trial on 18 to 21 April 2017 and requesting a status hearing to address the issue in view of the approaching trial date. These steps only elicited a response on 31 March 2017 from the plaintiff's legal practitioners in which it was stated that its instructed counsel had returned to chambers and that 'proposals' regarding the trial would be made. Despite this, nothing further was forthcoming from the plaintiff's legal practitioner before the trial date. Although the court *a quo* enquired why a postponement was not timeously sought in terms of rule 96(3), plaintiff failed to explain why a postponement application was not brought. Plaintiff further did not seek the opportunity to launch an application for postponement together with an application to condone non-compliance with rule 96(3) and the failure to file its witness statements. Defendant's legal practitioners sought a sanctions order against the plaintiff in the form of a dismissal of the claim or an order striking the plaintiff's claim and costs on the scale as between attorney and own client alternatively on an attorney and client scale.

The court *a quo* made an order striking the plaintiff's summons and amended particulars of claim and replication and costs as between attorney and client. The court *a quo* further ordered that the plaintiff may institute its action against the defendant anew and that the action was finalised and removed it from the floating roll. Plaintiff noted an appeal to the Supreme Court. Although the appeal was noted timeously, plaintiff failed to lodge the appeal record and its security within the prescribed time periods in terms of the Supreme Court Rules. These non-compliances led to plaintiff's appeal deemed to be withdrawn. Plaintiff applied for condonation for its non-compliance with the rules of the Supreme Court and for the reinstatement of the appeal. Defendant opposed this application.

Preliminary points were taken on appeal by the defendant that the court's order is not appealable in that the plaintiff could apply for relief from sanctions under rule 56 and even if it were so, leave would be required because the order was interlocutory. The following issues are determined, whether the order was appealable and if so, whether leave to appeal was required; whether the explanation for the delays is adequate and whether there are prospects of success on appeal when the application for condonation is considered.

Held that, rule 56 empowers a managing judge to condone non-compliance with a rule, practice direction or court order on good cause shown and provide relief from a sanction imposed upon a party. The exercise of this power would depend on the nature of the sanction imposed. It cannot apply to the dismissal of a claim or the entering of a final judgment even if such an order were imposed under rule 53.

Held that the court *a quo*'s order struck the claim and replication. The order specifically stated that the matter was finalised and that a new action would need to be instituted.

It is held that the order was appealable and did not require leave.

Held that, the explanation provided by Mr Brandt for the condonation application does not meet the requisite of being 'full, detailed and accurate'. The principle contained in *Katjaimo v Katjaimo & others* find application. On the merits of the appeal, the plaintiff would need to show that it has prospects of success on appeal. Having heard full argument on the merits, the court was not persuaded that the appeal enjoys any prospects of success on appeal and that it had not been shown that the High Court had exercised its discretion on a wrong principle.

APPEAL JUDGMENT

SMUTS JA *et* MOKGORO AJA (MAINGA JA concurring):

[1] The appellant as plaintiff instituted an action for damages against the respondent in 2015. After pleadings closed, there was a series of pre-trial orders providing for the filing of witness statements. As sometimes occurs, the dates for the filing of these statements were staggered with the defendant to file a few weeks after the plaintiff. (For the sake of convenience, the parties are referred to in this way).

[2] The trial was set down for a week starting on 18 April 2017. When it was due to commence, the plaintiff had not filed any witness statements, nor a postponement application and no condonation application for the failure to attend to either of these steps in time. After hearing argument in phases, the court granted the following order:

- '1. The plaintiff's summons and amended particulars of claim and replication are hereby struck.
2. The plaintiff shall pay the taxed wasted costs on an attorney and client scale to include the costs of two instructed and one instructing counsel and to also include two reserved court days, and shall do so on or before this 31st day of July 2017.
3. The plaintiff may institute its action against the defendant anew as the matter was not decided on its merits.
4. This matter under his case number is finalised and removed from the action floating roll.'

[3] The plaintiff timeously noted an appeal but failed to lodge the record and its security within the time periods provided for in the rules and the appeal was deemed to be withdrawn. The plaintiff accordingly applies for condonation for its non-compliance with the rules of this court and for reinstatement of the appeal. This application is opposed.

Background facts

[4] After pleadings closed, the parties agreed to a pre-trial order made on 10 August 2016 in terms of which the plaintiff would deliver witness statements by 9

September 2016 and the defendant by 7 October 2016. The trial was set down for 18 to 21 April 2017. As a result of the serious illness of the plaintiff's instructed counsel, the plaintiff on 14 September 2016 proposed new dates for exchanging statements - of 4 November and 5 December 2016 respectively. The trial date was to be unaffected by this. The plaintiff again failed to provide its statements on the designated date and on 17 November 2016 sought a meeting in chambers with the managing judge on 25 November 2016. At this meeting, dates of 24 February and 10 March 2017 were agreed and provided for.

[5] When the plaintiff again failed to file its statements, the defendant's legal practitioner on 1 March 2017 addressed the plaintiff's practitioner on the issue, recording its prejudice as a result and reserving its rights. When there was no response to this, the defendant's legal practitioner on 7 March 2017 delivered a status report, informing the managing judge of the plaintiff's failure to file statements in the context of the looming set down of the trial on 18 to 21 April 2017 and requesting a status hearing to address the issue in view of the approaching trial date.

[6] These steps only elicited a response on 31 March 2017 from the plaintiff's legal practitioners in which it was stated that its instructed counsel had returned to chambers and that 'proposals' regarding the trial would be made. Despite this, nothing further was forthcoming from the plaintiff's legal practitioner before the trial date. When the matter was called in court on the trial date, plaintiff's instructing legal practitioner thus addressed the court:

'Yes Your Lordship would have noted that the matter was set down on the actual floating roll for this week. I believe Advocate Visser the instructed counsel in this matter has already addressed Your Lordship briefly in chambers regarding the fact that this matter will not be proceeding on account of certain non-compliances with the previously adopted pre-trial reports and that the witness statements have not been filed by either of the parties. And on that basis the matter cannot proceed during the cause of this week.'

[7] The trial judge on more than one occasion enquired why an application for postponement had not been brought in accordance with rule 96(3) which provides:

'When a matter has been set down for hearing a party may, on good cause shown, apply to the judge not less than 10 days before the date of hearing to have the set down changed or set aside.'

[8] Despite being invited on more than one occasion to do so, no explanation was given why no application for postponement had been brought. Nor was leave sought to launch one together with an application to condone non-compliance with rule 96(3) and the failure to file witness statements. Further submissions were made by both sides. Defendant's counsel sought a sanctions order against the plaintiff in the form of a dismissal of the claim or an order striking the plaintiff's claim and costs on the scale as between attorney and own client alternatively on an attorney and client scale.

[9] The High Court heard further submissions and at one point adjourned proceedings to enable the plaintiff's practitioners to endeavour to rescue the matter. Upon resumption, the plaintiff's practitioners were not able to even obtain an instruction for a tender as to costs. The proceedings adjourned again and a tender in respect of costs acceptable to the defendant was still not forthcoming. More submissions were advanced whereafter the court adjourned and returned to

make the ruling as set out above, after first referring to rules 96(3) and (5), 53 and 54 and practice direction 62(5).

[10] The plaintiff noted an appeal against the court's order within the prescribed time period on 9 May 2017. The record was to be filed by 17 July 2017. But it was only lodged on 11 October 2017, close to 3 months out of time and security was filed on 21 July 2017, four days late.

Appealability and leave for appeal?

[11] Ms B de Jager for the defendant took the preliminary points that the court's order is not appealable and if it were so, leave would be required because the order was interlocutory.

[12] Ms De Jager argued that the order lacked the attributes to constitute an appealable judgment as the decision by the court was not final in the sense that it was susceptible to alteration by that court and that the decision did not have the effect of disposing of at least a substantial portion of the relief.

[13] Ms De Jager referred to rule 56 which provides for applications for relief from sanctions imposed under rule 53. This rule empowers a managing judge to condone non-compliance with a rule, practice direction or court order on good cause shown and provide relief from a sanction imposed upon a party. The exercise of this power would depend on the nature of the sanction imposed. It cannot apply to the dismissal of a claim or the entering of a final judgment even if such an order were imposed under rule 53.

[14] The court's order was to strike the claim and replication and the court went on to specifically make it clear that the matter was finalised and that the plaintiff would need to institute an action afresh.

[15] The intention of the court was clear – to finally dispose of the action instituted by the plaintiff and to require it to institute proceedings afresh. That claim was thus finally disposed of between the parties and a new action would need to be instituted, thus disposing of that action.

[16] This order, like one dismissing the action, would not be of the kind to be amenable to an application under rule 56 even if given under rule 53. Nor was it interlocutory as it was final in the sense of disposing of the parties' rights and required a fresh action to be instituted.

[17] The order was thus appealable and did not require leave.

Application for condonation

[18] The principal of the plaintiff's erstwhile legal practitioners, Mr F. C. Brandt, on 11 October 2017 applied for condonation for the late filing of the record and security and sought the reinstatement of the appeal.

[19] Mr Brandt deposed to the founding affidavit in support of the condonation application, essentially blaming Ms A Isaaks, his erstwhile professional assistant for her handling of the matter resulting in it being struck and the non-compliance

with the rules concerning the filing of the record and security. Mr Brandt in the latter regard stated that he 'regularly followed up with Ms Isaaks regarding the procedural progress of the appeal and was every time assured by her that all procedures as prescribed in the rules of the Supreme Court were and have been complied with'.

[20] He further stated that he had no reason to doubt her and 'truly believed her that all the procedural formalities have been complied with'. At that stage, the procedural formalities requiring compliance were the filing of the record and security. Mr Brandt then states that on 31 July 2017, Ms Isaaks resigned from his firm, to leave on 28 August 2017. In the course of the handover (of files) he stated that Ms Isaaks again informed him that 'all the necessary statutory procedures had been complied with' and that she was awaiting the allocation of the date of hearing. After being briefly away from office from 28 September to 4 October 2017, he discovered on 9 October 2017 a notice to the effect that taxation was to take place in this matter on 11 October 2017. He said it was then that he became aware of a letter dated 19 July 2017 from the assistant registrar of this court pointing out that the appeal had lapsed by reason of the failure to file the record timeously and pointing out that security had also not been provided. He stated that he then investigated the matter and established that Tunga Holdings (Pty) Ltd had informed his firm on 14 June 2017 that the record was ready for collection but first requiring payment of N\$8533.57.

[21] Mr Brandt also stated that he noted that there was a disagreement between a director of the plaintiff, Mr Andreas Vaatz, who is also a seasoned legal practitioner, and Ms Isaaks as to who should bear the costs of the record, with Mr

Vaatz insisting that Mr Brandt's firm should pay those costs. He stated that he had no knowledge of this 'dispute' and had he known of it, he would have made that payment himself (which he did on 9 October 2017). As for the bond of security he stated:

'I also, after consideration of the . . . file noticed and became aware thereof that the bond of security on behalf of the applicant as security for costs was also filed late and only on 21 July 2017, some 3 days after the . . . appeal had become deemed withdrew and/or lapsed.'

[22] He stated that he recalled that Ms Isaaks approached him to sign the bond of security on 21 July 2017 but on that occasion being assured by her that all procedural requirements had been duly attended to.

[23] In the answering affidavit filed on 20 October 2017, the defendant's legal practitioner stated that he contacted Ms Isaaks about the allegations against her and was informed she had not received a copy of the application. After making a copy available to her, legal practitioners on her behalf placed in issue several of the statements concerning her.

[24] In particular, it is stated on her behalf that she apprised both Mr Vaatz and Mr Brandt of the outcome of the proceedings whereupon Mr Vaatz stated that the plaintiff would not bear any of the costs of appeal, both in relation to providing security for costs and for the record. It was recorded that Mr Brandt proceeded to provide security himself and that he was informed that the record was ready for collection before 18 July 2017.

[25] The defendant's legal practitioner further stated that Mr Brandt had addressed him on 9 May 2017 already concerning the amount of security to be provided. There followed an exchange of correspondence on that issue with Mr Brandt, with the latter disagreeing on the amount and culminating in a letter from Mr Brandt requiring him to attend a meeting with the Registrar to set security on 16 June 2017. That meeting actually took place on 23 June 2017 and was attended by Ms Isaaks, when the amount was fixed. The bond was however only provided on 21 July 2017, after the Registrar had advised that the appeal had lapsed.

[26] Mr Brandt did not reply to the answering affidavit in the ensuing 10 month period before he took his own life.

[27] After his death, Mr Vaatz came on record for the plaintiff and some months later filed a replying affidavit. As to the merits of the matter, Mr Vaatz candidly acknowledged that the conduct of Mr Brandt and Ms Isaaks leading to the striking of the matter was 'unprofessional and negligent' and for that reason had required that they should bear the costs of the appeal. Mr Vaatz was, in his capacity as the sole director of the plaintiff resident in Namibia, informed on 14 September 2016 of the trial date and the need to have filed witness statements by 9 September 2016. This resulted in him addressing several letters to the firm of Chris Brandt Attorneys, requiring that he be kept abreast of developments, given his concern about the manner in which that firm was handling the matter.

[28] When received no answers to his repeated enquiries, he urged Ms Isaaks to ensure that the matter should not 'miss the trial for procedural reasons such as

not timeously appointing another counsel or attending to the pre-trial procedures such as the preparing and filing of witness statements’.

[29] Mr Vaatz confirmed that he stated to Mr Brandt that he should provide the required security (which Mr Brandt did) and bear all costs of appeal.

Parties’ submissions

[30] Mr J Marais, SC, who together with Ms Y Campbell, appeared for the appellant, correctly conceded that the plaintiff’s erstwhile legal practitioners had been clearly negligent and had in several aspects breached the rules of court. He submitted that condonation should nevertheless be granted. He pointed out that the condonation application was launched by Mr Brandt shortly after he became aware that the record had not been filed. He argued that the delay of three months is comparatively short in the context of the history of the matter (and that the delay of 3 – 4 days in respect of security was of a short duration). Mr Marais also submitted that there was no real prejudice caused by reason of the delay. He also contended that the plaintiff was unaware of the condonation application until 20 January 2019 and that no blameworthy conduct can be attributed to the plaintiff.

[31] As to the merits of the appeal, Mr Marais contended that it was doubtful that the High Court had jurisdiction to effectively dismiss the plaintiff’s claim as a sanction for not complying with procedural matters. Dismissal (in effect), he argued, constituted more than a procedural sanction or penalty. He also contended that the court should in any event not have granted the order by reason of the failure to file witness statements and for not timeously applying for

postponement of trial. He submitted that if the court wanted to dismiss the action, the plaintiff should have been afforded the opportunity to file affidavits to address that issue or postponement. By dismissing the action in effect, Mr Marais argued that the court did not exercise its discretion judiciously.

[32] Mr Marais also argued that the claims raised a triable issue which carried a prospect that the indemnity pleaded in defence of the claim would not avail the defendant.

[33] Ms De Jager argued that condonation should not be granted because no reasonable or sufficient explanation for the delay was provided. Ms De Jager contended that this was not a case where the plaintiff should be exonerated from its erstwhile lawyers' conduct. On the contrary, Ms De Jager submitted that the plaintiff was well aware of how negligently the matter had been attended to but elected to leave it in the same hands without following up.

[34] Turning to the merits, Ms De Jager strenuously argued that the High Court duly exercised its discretion under rule 53 and that the appeal was without merit, given the plaintiff's legal practitioner's failure to provide an explanation for the failure to file witness statements and to bring a postponement application. Ms De Jager argued that the practitioner was ignorant of rule 96(3) and, even after it was pointed out, failed to provide an explanation for the failures to file statements and bring a postponement application timeously or at all. The court, Ms De Jager contended, duly acted in terms of rule 53.

Applicable principles

[35] As this court has stressed time and again, the repeated failures by practitioners to comply with the rules of this court cause delays in finalising appeals and is severely disruptive of the administration of justice and the functioning of this court. Foremost amongst non-compliance with the rules is the failure to file records on time and lodging records which are incomplete or fail to comply with the rules. There has been emphatic reference to this recurring failure recently in *Katjaimo v Katjaimo & others*¹ where the Deputy Chief Justice directed the following unequivocal admonition to practitioners:

‘[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 Aquilian 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.”

[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

¹ 2015 (2) NR 340 (SC). See also *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC); *Shilongo v Church Council of ELC* 2014 (1) NR 166 (SC).

judged by the explanations offered under oath in support of the condonation applications that come before the court.'

[36] It is well settled that not only should an application for condonation establish a 'full, detailed and accurate' explanation for the non-compliance, but must also show reasonable prospects of success in the appeal.²

[37] As to the sufficiency of the explanation, Mr Brandt merely stated that after noting the appeal, he 'regularly followed up' with Ms Isaaks concerning the procedures to be complied with and was 'every time assured by her that all the procedures as prescribed . . . were and have been complied with', including at the handover of files after Ms Isaaks resigned on 31 July 2017 and before her departure on 28 August 2017.

[38] It was only after the defendant was about to proceed with taxation on 9 October 2017 that Mr Brandt stated that he realised that a letter dated 19 July 2017 had been received by his firm that the appeal had lapsed by reason of the failure to timeously lodge the record and security. In respect of security, he created the impression of peripheral involvement by stating 'I also after consideration of the file, noticed and became aware thereof that the bond of security on behalf of the applicant as security for costs was also filed late and only on 21 July 2017, some 3 days after the due date', and stating that Ms Isaaks had around 21 July 2017 requested him to sign a bond of security.

[39] In respect of the record, he pointed out that already on 14 June 2017 Tunga had advised that the record was ready and required payment before releasing it

² *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at para 5.

and referred to a 'dispute' between Mr Vaatz and Ms Isaaks as to the costs of the record, (with Mr Vaatz insisting that Mr Brandt's firm should bear those costs). Mr Brandt stated that he 'had no knowledge of this dispute between Mr Vaatz and Ms Isaaks' and would have caused payment for the record which he did when filing the record.

[40] Mr Brandt essentially sought to place the blame for the non-compliances upon Ms Isaaks.

[41] When a copy of his application was provided to Ms Isaaks, the latter squarely took issue with his version in material respects. Ms Isaaks denied assuring Mr Brandt that procedural steps were being complied with and denies his lack of knowledge of Mr Vaatz's refusal for the plaintiff to pay any of the costs of appeal. Crucially her version on this material fact is confirmed by Mr Vaatz in his replying affidavit where he states that he advised Mr Brandt that the latter must pay all the costs of appeal. Pursuant to this insistence, Mr Brandt himself furnished security for the appeal. Significantly, this he did on 21 July 2017, straight after the assistant registrar informed his office that the appeal had lapsed.

[42] It is thus clear that Mr Brandt was aware of Mr Vaatz's position on the payment of the costs of appeal. This would not have given rise to a 'dispute' with Ms Isaaks and not have caused a delay. Mr Brandt would have been aware of the plaintiff's position at the time.

[43] Mr Brandt furthermore does not disclose in his founding affidavit that he in fact took the initiative in securing a lesser amount to be paid for security for costs. This demonstrates that he was actively involved in one of the two procedural steps to be taken to prosecute the appeal. The only remaining procedural step requiring attention was lodging the record on time. He would have been aware that his firm would need to pay for the record in view of Mr Vaatz's position. Yet his founding affidavit seeks to create a contrary impression.

[44] Not only is his explanation vague in respect of detail and dates, but it is unsatisfactory in not disclosing his role in addressing the question of security, thus undermining the impression he created of Ms Isaaks attending to procedural steps and giving him assurances. He himself corresponded with the defendant's practitioner on security and after it was set, paid it himself. He was thus centrally involved in that procedural step, contrary to the impression he sought to create in his founding affidavit. He would also appear to be less than candid concerning the need for his firm to pay for the record. Being fully conversant of the question of security, he would have known when the record needed to be filed (as they are to be lodged at the same time) and that it would not be filed without his payment for its preparation. How he could accept the disputed assurances, is, at best for him, questionable in the circumstances.

[45] After these and other unsatisfactory features of his explanation are raised in the answering affidavit, all calling for a response, Mr Brandt however failed to make a replying affidavit during the prescribed period for it – and for the ten months which followed the filing of the answering affidavit until his death.

[46] It would follow in our view that the explanation provided by Mr Brandt does not meet the requisite 'full, detailed and accurate' and was less than candid and unsatisfactory.

[47] As for the merits of the appeal, the plaintiff would need to show that it has prospects of success on appeal. Having heard full argument on the merits, we are unpersuaded that the appeal enjoys any prospects of success on appeal.

[48] There was a persistent failure to provide witness statements by the plaintiff from September 2016. The parties agreed to the staggered filing of statements embodied in the pre-trial order of 10 August 2016. The trial date was set and this crucial preparatory step was required well in advance of the trial. The plaintiff's Mr Vaatz explains that the statement(s) would be short and uncomplicated. Yet the plaintiff failed to meet the three deadlines it had agreed to for doing so. The September date was at its instance vacated and was shifted to 4 November 2016 (with 5 December for the defendant). When this second date was not kept, the plaintiff's practitioner arranged a meeting with the managing judge in chambers at which the dates of 24 February 2017 and 10 March 2017 were set. The plaintiff's instructed counsel's medical condition was stated by the defendant's practitioner in his answering affidavit to have improved and that she was back in chambers by at least March 2017. This is not disputed in reply.

[49] After the plaintiff's witness statements were not provided, an email on 1 March 2017 to the plaintiff's practitioners elicited no response. A request for a status hearing by defendants practitioners on 7 March 2017 only resulted in an email on 31 March 2017 to say that instructed counsel was about to return to the

office to take up the matter once again and the promise of proposals which were not forthcoming.

[50] Instead the plaintiff's practitioner appeared in court when the trial was called to announce that the matter was 'not proceeding'. No explanation for the failure to provide witness statements or an application to condone that failure was given. Nor as to why a postponement application had not been brought pursuant to rule 96(3) ten days before the hearing [or more recently coupled with an application to condone non-compliance with rule 96(3)]. Nor was there even a tender made for the defendant's costs.

[51] The presiding judge, plainly troubled by the failure to provide an explanation for the failure to file statements and to bring an application for postponement in accordance with rule 96(3) or at all, probed the plaintiff's practitioner with prompts for any basis to rescue the position. A reading of the transcript of the record more than demonstrates this. Yet the plaintiff's practitioner declined to take up the life lines on offer.

[52] It is not clear what the plaintiff's practitioner expected the court to do in the face of a failure to explain the non-compliance with the pre-trial order and to bring a postponement application timeously in terms of rule 96(3) or at all (coupled with an application to condone non-compliance with the sub-rule).

[53] Rule 96(3) is clear, requiring in mandatory terms that a postponement application is to be made ten days before a scheduled hearing. Its purpose is plain and is to ensure that cases proceed on their assigned dates in furtherance of the

fundamental principles of judicial case management to ensure the expeditious resolution of disputes. This is buttressed by practice direction 62(5) published by the Judge President under rule 3(3) of the High Court rules. This practice direction provides:

‘The High Court pursues a 100% clearance rate policy, and in pursuit of the policy, the court must, unless there are compelling reasons to adjourn or vacate, apply a strict non-adjournment or non-vacation policy on matters set down for trial or hearing.’

[54] Rule 96(3) has been in force since 16 April 2014 and the practice directions were published on 9 May 2014. There is simply no excuse for practitioners who practise in the High Court to be unaware of the rules and practice directions. Acting in such defiance of these provisions goes beyond mere negligence as was conceded by the plaintiff and enters the realm of gross negligence and recklessness.

[55] In the face of rule 96(3) and practice direction 62(5), it strains belief that a practitioner can arrive at court on a trial date and merely announce that a matter set down for a week will not be proceeding without any explanation (or even making a tender for costs) and expect that it should then be postponed.

[56] The defendant’s legal practitioner understandably proposed that there should be a form of sanction visited upon this flagrant failure to comply with the court order to provide statements and rule 96(3).

[57] Rule 53 of the High Court rules provides:

‘Sanctions for failure to comply with these rules, practice direction or court order or direction

(1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –

- (a) attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
- (b) participate in the creation of a case plan, a joint case management report or parties’ proposed pre-trial order;
- (c) comply with a case plan order, case management order, a status hearing order or the managing judge’s pre-trial order;
- (d) participate in good faith in a case planning, case management or pre-trial process;
- (e) comply with a case plan order or any direction issued by the managing judge; or
- (f) comply with deadlines set by any order of court,

the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).

(2) Without derogating from any power of the court under these rules the court may issue an order –

- (a) refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) striking out pleadings or part thereof, including any defence, exception or special plea;
- (c) dismissing a claim or entering a final judgment; or
- (d) directing the non-compliant party or his or her legal practitioner to pay the opposing party’s costs caused by the non-compliance.’

[58] The plaintiff had comprehensively failed to comply with the pre-trial order to provide witness statements. Not only was there no reasonable explanation but

there was no explanation at all. The plaintiff also without any explanation at all failed to comply with rule 96(3) and practice direction 62(5).

[59] Mr Marias would not appear to take issue with the fact that the court would be authorised to impose a sanction but, as I understood his argument, took issue with the severity of the sanction imposed in the exercise of the court's discretion although also doubting that such a sanction can be imposed as a sanction for non-compliance with a procedural step.

[60] Rule 53 affords a court faced with the failure to comply with the rules, court orders and practice directions a wide discretion in imposing an appropriate sanction. And rightly so, given the divergent nature of non-compliances and their level of seriousness in the context of the objectives of judicial case management.

[61] The court is authorised to make any order that is just and fair in the matter including those set out in rule 53(2).

[62] One of the specific orders contemplated under sub-rule (2) is striking out pleadings as well as dismissing a claim and entering a final judgment.

[63] Despite Mr Marais expressing doubt as to whether an order of the kind made by the court is authorised by the rules, rule 53(2) expressly contemplates such an order and dismissal of claim and the entering of a final judgment as a sanction. The court thus had jurisdiction to do so.

[64] The only question remaining is the attack upon the exercise of the court's discretion. As has been made clear by this court and correctly accepted by Mr Marais, the ambit of an appeal is narrower when directed against the exercise of a discretion of the kind contemplated by rule 53.³ An appellate court would only interfere with a decision involving the exercise of discretion if the discretion was not exercised judicially⁴ as summarised:

'The relief sought related to a matter falling within the inherent powers of the high court to regulate its own procedures. As such, the discretion which the court a quo exercised on consideration of the facts of this case, was judicial in nature and involved a value judgment on whether the appellants had given a proper and satisfactory explanation for their failure to include the amplified papers as part of the election application. Although a discretion of that nature is not unfettered, it is well settled that a court of appeal would be slow to interfere with it "unless a clear case for interference is made out and (it) should not interfere where the only ground for interference is that the Court of appeal might have an opinion different to that of the Court a quo or have made a different value judgment". The power to interfere on appeal in such instances is strictly circumscribed. It is considered a discretion in the "strict or narrow sense, ie a discretion with which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself".'⁵

[65] Mr Marias forcefully argued that the consequences for gross negligence on the part of practitioners should not have been visited upon its unknowing client. The difficulty with this submission is that no explanation was provided by the plaintiff's legal practitioner despite several opportunities provided by the court to do so. Indeed the court bent over backwards to coax the plaintiff's practitioner into

³ *South African Poultry Association and others v Minister of Trade and Industry and others* 2018 (1) NR 1 (SC) at para 44.

⁴ *Standard Bank Ltd and others v Maletsky and others* 2015 (3) NR 753 (SC)

⁵ *Rally for Democracy and Progress and others v Electoral Commission for Namibia and others* 2013 (3) NR 664 (SC) at para 106.

some form of explanation but these invitations were astonishingly not accepted. It emerges in the condonation application that the plaintiff's director providing instructions is an experienced legal practitioner who was alive to the need to provide witness statements and what would be canvassed in such statements and was also very significantly was aware of the trial date (and the need to file those statements well in advance of the trial date). Mindful that the plaintiff's practitioners had not met earlier deadlines for filing witness statements and not receiving any feedback despite repeated requests, he should have been placed on notice that there was neglect, yet, he failed to take any steps to address the position. This is certainly not an instance where a litigant can escape the results of its practitioner's neglect or the insufficiency of – and indeed complete lack of – an explanation. Given the gross negligence in handling the trial and alive to the utter neglect to comply with the rules and the consequences of a failure to do so in prosecuting an appeal, the plaintiff's Mr Vaatz left the matter in the hands of the same practitioners without any follow-up.

[66] Given the entire lack of any explanation in the context of manifold opportunities given (and encouraged by the court) to provide one, the plaintiff has not established any basis for this court to find that the court had not exercised its discretion judicially.

[67] It follows that the appeal does not enjoy prospects of success and that the plaintiff has failed to establish both requisites for condonation.

[68] The application for condonation and reinstatement falls to be dismissed.

[69] The following order is made:

The application for condonation and reinstatement is dismissed with costs, including the costs of one instructing and one instructed legal practitioner.

SMUTS JA

MOKGORO AJA

MAINGA JA

APPEARANCES

APPELLANT:

J Marais, SC (with him Y Campbell)

Instructed by Andreas Vaatz &
Partners, Windhoek

RESPONDENT:

B de Jager

Instructed by Fisher, Quarmby &
Pfeifer, Windhoek