



REPORTABLE

CASE NO: SA 26/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SUN SQUARE HOTEL (PTY) LIMITED

Appellant

and

SOUTHERN SUN AFRICA

First Respondent

SOUTHERN SUN HOTEL INTERESTS (PTY) LTD

Second Respondent

Coram: DAMASEB DCJ, FRANK AJA and ANGULA AJA

Heard: 11 November 2019

Delivered: 9 December 2019

Summary: Appellant brought an application for condonation and reinstatement of the appeal due to the late filing of its appeal record. In his founding affidavit to the application, the legal practitioner for the appellant explained that it was his 'understanding' that the appeal record had to be filed within three months after the notice of appeal had been filed instead of three months after the judgment or order appealed against was delivered as prescribed in rule 8(2) of this court.

It is the duty of a legal practitioner to acquaint themselves with the rules of the court in which the appeal is to be prosecuted. This duty has often been emphasised in past decisions and has been settled law for a very long time. It was especially important in this appeal for the legal practitioner to exercise this duty as the new rules had only been in place for about six months when this appeal was lodged in the Supreme Court.

The new rules of this court came into effect on 15 November 2017, when compared to the old rules (which were in place from October 1990), they made no major procedural changes to rules 7 and rule 8. These rules are by and large a copy of the rules of the then South African Appellate Division which was the final court of appeal in Namibia prior to its independence. The rules of the Appellate Division were in place as far as Namibia is concerned from, at least, June 1962 (ie nearly 56 years).

The test for condonation is that first, there must be a reasonable and acceptable explanation for the non-compliance, and second, there must be reasonable prospects of success on appeal. There is some interplay between these two considerations (eg good prospects of success may lead to the granting of a reinstatement application even if the explanation is not entirely satisfactory. However, a totally unacceptable explanation or no explanation will not save an application even if there are good prospect of success, and conversely, an entirely satisfactory explanation will not save an application when there is no prospects of success on appeal).

Held that, it is evident from the explanation tendered, the legal practitioner did not acquaint himself with either the new or the old rules but acted on his 'understanding'.

Held, in view of the frequent warnings of this court concerning the laxity of legal practitioners when it comes to the rules concerning appeals, the explanation for the late filing of the record in this case is not reasonable and acceptable. It amounts to no explanation.

Held, the non-compliance with the rule relating to the late filing of the record was not satisfactorily explained, thus the application falls to be dismissed for this reason alone.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and ANGULA AJA concurring):

A. Introduction

[1] In this matter, the appeal had lapsed due to the late filing of the record. Appellant seeks condonation for the late filing of the record and applies for reinstatement of the appeal.

[2] The gist of the explanation proffered for the non-compliance is that the legal practitioner for the appellant thought that the record had to be filed within three months after the notice of appeal had been filed instead of three months after the judgment or order appealed against was delivered as prescribed in the rules of this court.

[3] Rule 8 of this court states as follows: (I quote only the portion relevant to the issue in hand.)

‘After an appeal has been noted in a civil case the appellant must, . . . , file four copies of the record of the proceedings . . . within 3 months of the date of the judgment or order appealed against.’

[4] A notice of appeal must be filed within 21 days after the pronouncement of the judgment or order appealed against in terms of rule 7(1) of this court. There is thus an overlap of the time periods applicable to the filing of a notice of appeal and the filing of the record for the purposes of the appeal. Thus, if an appellant files a notice of appeal on the last day of the time period allowed for this than 21 days of the three months period to file the record would already have expired.

[5] The current Rules of the Supreme Court (the new rules) came into effect on 15 November 2017, ie just more than six months prior to the notice of appeal in this matter being filed on 22 May 2018.

[6] The previous or old rules of this court in respect of the noting of an appeal and the filing of records of appeals were taken over unchanged in the new rules. The old rules were in place from October 1990 and were by and large a copy of the rules of the then South African Appellate Division which was the final court of appeal in Namibia prior to its independence. The rules of the Appellate Division referred to were in place as far as Namibia is concerned from, at least, June 1962.¹

[7] In short the rules of the then Appellate Division were exactly the same as the current rules in respect of noting an appeal and filing of the record.² So was the old rule 5(1) and 5(5)(b) of this court. The same time limits have thus been applicable in this regard from, at least June 1962; ie for nearly 56 years when the notice of appeal was filed in this matter.

¹ Nathan, Barnett Brink *Uniform Rules of Court* 3 ed at 512 and 521-522.

² Rule 5(1) and 5(4)(b) of the AD which is set out in Nathan et al above.

B. Duties of legal practitioners with regard to the rules³

[8] In *Channel Life Namibia Ltd v Otto*⁴ the then Chief Justice lamented the fact that so many appeals had to be preceded by condonation applications involving non-compliance with the rules of court. He addressed the role of legal practitioners as follows:

'Before doing so I must point out that at each session of the Supreme Court there are various applications for condonation because of non-compliance with some or other of the rules of the court. Many of these applications could have been avoided through the application of diligence and by giving the process a little more attention. Practitioners should inform themselves of the provisions of the Rules of the Supreme Court and cannot accept that those rules are the same as that of the High Court.'⁵

[9] In *Kleynhans v Chairperson of the Council of the Municipality of Walvis Bay & others*⁶ the court referred with approval to the following remarks from Friedman AJA in the South African Appellate Division:

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.'

³ *Tweya v Herbert* (SA 76-2014) [2016] NASC (6 July 2016) where the applicable principles are succinctly summarised with reference to the case law I also refer to below.

⁴ 2008 (2) NR 432 (SC).

⁵ *Channel Life* case para 47.

⁶ 2013 (4) NR 1029 (SC) at 1031D-F.

As it is evident from what is stated above, the duty of a legal practitioner when representing a client on appeal has often been emphasised in past decisions and has been settled law for a very long period of time.

[10] The warning was reiterated by the Chief Justice in the case of *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia*⁷ in the following terms:

'Virtually every appeal that I was involved in during the recent session of the court was preceded by an application for condonation for the failure to comply with one or other rule of the Rules of Court. In all those appeal matters, valuable time and resources were spent on arguing preliminary issues relating to condonation instead of dealing with the merits of the appeals. In spite of observations in the past that the court views the disregard of the rules in a serious light, 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 an attitude is unhelpful and is to be deprecated.'

and at p 169G-H para 6:

'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.'

⁷ 2014 (1) NR 166 (SC) at 169E-F para 5.

[11] In the *Katjaimo v Katjaimo*⁸ case the same issue was taken up by the Deputy Chief Justice who made the following statement in this regard:

‘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.’

[12] Whereas the attitude of the respondent in any condonation application is a relevant consideration this is not definitive in any case. It is for the court to decide whether a satisfactory explanation is advanced for the non-compliance with the rules.⁹ I mention this because in the present matter the respondents’ stance is whereas the appellant advances a ‘*bona fide* explanation’ for the non-compliance it has no prospects of success on the merits’.

C. Test for condonation

[13] It is trite law that for a condonation application, such as the present one, to succeed there are two broad considerations. First, there must be a reasonable and acceptable explanation for the non-compliance. Second, there must be reasonable prospects of success on appeal.¹⁰ There is some interplay between these two considerations, eg good prospects of success may lead to the granting of a

⁸ 2015 (2) NR 340 (SC) at 350C-D.

⁹ *PE Bosman Transport Works Committee & others v Piet Bosman Transport* 1980 (4) SA 194 (A) at 797G.

¹⁰ *United Africa Group (Pty) Ltd v Uramin Inc & others* 2019 (1) NR 276 (SC) para 4 and cases there cited.

reinstatement application even if the explanation is not entirely satisfactory. Thus, in *Road Fund Administration v Scorpion Mining Company (Pty) Ltd* overwhelming prospects of success and public importance of the issue in question led to condonation application being granted despite non-compliance which bordered on being glaring, flagrant and not satisfactorily explained.¹¹ Whereas the broad considerations are generally considered conjunctively this is not always so. Thus, where there is no acceptable explanation for the glaring or flagrant non-compliance with the rules, the application may be dismissed without consideration of the prospects of success on appeal.¹² Conversely, an entirely satisfactory explanation will not save an application when there is no prospects of success on appeal.

D. Explanation for non-compliance

[14] The legal practitioner of the appellant involved in the late lodging of the record explains the position in the founding affidavit to the reinstatement application.

[15] He says he ‘understood’ that he had to file the record within three months. He states his ‘wrong understanding was’ that the record had to be filed within three months of filing the notice of appeal. As mentioned, the notice of appeal was filed on 22 May 2018. In a letter dated 14 June 2018 the deputy registrar of this court informed him that his appeal had lapsed even prior to the filing of the notice of appeal. According to the deputy registrar, this was the effect of rule 7(3) which was relevant because the court *a quo* initially only gave an order and the reasons for the order followed later. The legal practitioner responded to this letter from the deputy registrar

¹¹ 2018 (3) NR 829 (SC) para 2.

¹² See footnote 8 above and the cases referred to.

and with reference to rules 7(1) and 7(3) (which he quotes) to convince the deputy registrar that this notice of appeal was filed timeously. He states that although he considered the rules when responding to the registrar, he still 'did not pick up that the three months commence to run on the date the judgment was granted and not on the date the appeal was noted'.

[16] Per letter dated 15 August 2018, the assistant registrar of this court informed the legal practitioner acting for the appellant that the appeal had lapsed as the record was filed out of time. According to the legal practitioner, when he received the letter on 17 August 2018 he then referred to the rules and realised that the record was indeed filed out of time. In his words: 'Upon careful perusal of the Supreme Court Rules, I noticed that the assistant registrar is correct'. He then wrote to the respondents' legal practitioner to seek an extension of the time period to file the record in terms of rule 8(2)(c) and prepared the reinstatement application. The application was lodged on 20 August 2018 and there appears to have been no response to his letter addressed to the respondents' legal practitioner.

E. Consideration of explanation

[17] The legal representative does not explain how his 'wrong understanding' came about. He clearly did not read the rules as they are very clear and have been unchanged as mentioned above for more than half a century. The first time he perused the rule in this context was after it was pointed out by an official of this court that the appeal has lapsed due to the late filing of the record.

[18] Even when he had the opportunity to look at rule 8 when the query relating to the late filing pursuant to rule 7(3) was raised with him, he only addressed this query. The fact that rule 7(1) (which he quoted in his response in respect of the query) expressly requires that a notice of appeal had to be filed within 21 days after the judgment did not prompt him to read rule 8 which contains similar wording.

[19] The duty of a legal practitioner to acquaint himself or herself of the rules was particularly pertinent at the time because the new rules had only been in place for about six months by then. One would have expected that in such circumstances, the new rules would be studied to ascertain to what extent they differed from the old rules.

[20] As it is evident from the explanation tendered, the legal practitioner did not acquaint himself with either the new or the old rules but acted on his 'understanding'. How his understanding came about was not explained at all as already pointed out.

[21] It is boldly alleged that it was 'an unintentional and regrettable *bona fide* mistake/misunderstanding/misreading of rule 8(2) of the Supreme Court Rules on my part'. It is correct that his 'understanding' was a misunderstanding and to have relied on this 'understanding' was a mistake. Whether it was *bona fide* in view of his duty to study the rules and to not rely on his 'understanding' is debatable. The assertion that it might have been a 'misreading' of the rule is not based on evidence in the reinstatement application. Indeed the contrary appears from this application which is to the effect that he acted on his 'wrong understanding' and only came to realise this

when he read the rule after it was brought to his attention by the assistant registrar that he did not comply with rule 8. In fact the rule is clear and in place for so long that no literate person, never mind a legally trained person, will be able to interpret it in a manner the 'wrong understanding' caused it to be interpreted.

[22] In view of the frequent warnings of this court concerning the laxity of legal practitioners when it comes to the rules concerning appeals, the explanation for the late filing of the record in this case is not reasonable and acceptable. It amounts to no explanation. If the explanation proffered in this case is accepted, the court will have to accept every other explanation for failing to comply with the rule in question or indeed any other rule of this court.

[23] In the result the non-compliance with the rule relating to the late filing of the record was not satisfactorily explained, thus the application falls to be dismissed for this reason alone.¹³

[24] In the result the application for condonation for the late filing of the record and for the reinstatement of the appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed legal practitioners.

¹³ *Tweya* case above paras 43 and 44.

FRANK AJA

DAMASEB DCJ

ANGULA AJA

APPEARANCES

APPELLANT: S Namandje (with him M Ntinda)
Of Sisa Namandje & Co. Inc. Windhoek

FIRST and SECOND RESPONDENTS: R Michau SC (with him R Maasdorp)
Instructed by Engling, Stritter &
Partners, Windhoek