



NOT REPORTABLE

CASE NO: SA 70/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

OTJIKAOKO TRADITIONAL AUTHORITY

Appellant

and

**TJIMAKA TJAVARA
TJIJATU HERUNGA
RUPUTA TJISUTA
INSPECTOR GENERAL OF THE NAMIBIAN POLICE**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 16 October 2019

Delivered: 11 November 2019

Summary: Appellant brought an application for condonation and reinstatement of the appeal due to the late filing of its appeal record. Apart from this, it emerged that several other requirements stipulated in the rules have not been complied with (ie appellant's failure to file its power of attorney on time and failure to hold a meeting about the record with the other parties in terms of rule 11(10) of the Supreme Court Rules).

Held that, this court can, in its discretion, reinstate an appeal that has lapsed when it is satisfied that the explanation given for the non-compliance is reasonable and that the applicant has established prospects of success in respect of the intended appeal.

Held that, good prospects of success may lead to the granting of condonation and reinstatement despite the applicant not providing an entirely satisfactory explanation for the non-compliance. However, a totally acceptable explanation for the non-compliance will not be enough to reinstate an appeal where there are no prospects of success on appeal. Neither will prospects of success on appeal lead to reinstatement where there is no explanation for the non-compliance.

Held that, applicant's legal practitioner's attempt to attribute the delay to Tunga Transcription Services is not acceptable. It is an attempt to hide the legal practitioner's inaction especially during the period of five weeks that the matter was in the hands of the legal practitioner, namely from the date of filing the notice of appeal on 8 November 2017 until Tunga Transcription Services was approached on 13 December 2017 to transcribe the record. No explanation is tendered for this inaction.

It is held that, the condonation application fails irrespective of the prospects of success on appeal. Consequently, this application is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and HOFF JA concurring):

[1] The Otjikaoko Traditional Authority (the Authority) brought an application in the court *a quo* to evict the first to third respondents with their livestock from an area falling within the jurisdiction of the Authority. The fourth respondent was cited so that the court could authorise him to execute the order in the event of the other

respondents not adhering to such court order. The court *a quo* however refused the application and it is against this order that the Authority wishes to appeal.

[2] The judgment of the court *a quo* against which the Authority intends to appeal was handed down on 26 October 2017. A notice of appeal was filed against this judgment on 8 November 2017 by the legal practitioner of the Authority. In terms of the rules of this court, the appeal record had to be filed within three months of the receipt of the judgment. This was not done and the appeal was deemed to have been withdrawn, ie had lapsed. The Authority thus applies for the condonation of its failure to file the record timeously, and an order for the lapsed appeal to be reinstated.

[3] I point out in passing that, the new rules of this court came into effect on 15 November 2017, and they govern the appeal process from that date. The new rule 30(b) expressly provides that appeals noted under the old rules will be dealt with under the new rules. Apart from the failure to file the appeal record timeously, certain other requirements stipulated in the new rules were also not complied with. The power of attorney for the Authority was filed out of time, no meeting in terms of rule 11(10) was called with the legal practitioners representing the respondents relating to the record nor was there compliance with the rule governing the contents of the appeal record. No condonation was sought for these non-compliances.

[4] It is trite law that this court can, in its discretion, reinstate an appeal that has lapsed. It is further trite that to persuade this court to do so, an applicant to this relief must give an acceptable explanation for the non-compliance and must also establish

prospects of success in respect of the intended appeal¹. Legal practitioners appearing for a party in this court have a duty to acquaint themselves with the rules of this court where they act for a client in an intended appeal or in an appeal. Thus, failure on the part of such legal practitioners to adhere to the rules of this court will not necessarily be a ground to condone such non-compliance. In case of gross or flagrant breaches of the rules, condonation in the context of reinstatement applications can be refused without regard to the prospects of success on appeal.²

[5] The two requirements relating to reinstatement of an appeal are considered in conjunction with one another and are not necessarily considered in isolation. Both requirements need to be addressed in an application to condone such non-compliance and to reinstate an appeal. Thus, good prospects of success may lead to the granting of condonation and reinstatement despite the applicant not providing an entirely satisfactory explanation for the non-compliance. However, a totally acceptable explanation for the non-compliance will not be enough to reinstate an appeal where there are no prospects of success on appeal. Conversely, good prospects of success alone would not be enough if there is no explanation for the non-compliance.

[6] The legal practitioner acting for the Authority explained in his affidavit that he approached Tunga Transcription Services (Tunga) on 13 December 2017 to assist with the compilation of the appeal record. Two days later, on 15 December 2017, the

¹ See eg *Kleynhans v Chairperson for the Council for the Municipality of Walvis Bay & others* 2013 (4) NR 1029 (SC), *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) and *Dannecker v Leopard Tours Car and Camping Hire CC & another* (SA 79-2016) [2018] NASC (31 August 2018).

² See *Kleynhans* case, above.

firm to which the legal practitioner was attached closed for the traditional summer holidays only to reopen on 15 January 2018. Implicit in this averment is that the legal practitioner was also on holiday and hence did not follow up on this matter during this month. What is not stated is whether Tunga was also closed during this period. Be that as it may, the legal practitioner states that when he approached Tunga on 17 January 2018 upon his return to work, he was informed that ‘the records have been transcribed’ and the court files had been requested to finalise the appeal record. The legal practitioner clearly did not inform Tunga that it was not necessary to transcribe anything as the matter involved an application which meant that the court file in the court *a quo* had to be replicated with the addition only of the judgment *a quo* and the notice of appeal.

[7] If this legal practitioner had acquainted himself with the rules of this court, he would have known and seen that, unnecessary transcriptions such as the arguments in the court *a quo* which should normally not form part of an appeal record should have been excluded. He would also have taken note of the rules relating to the filing of the power of attorney and the requirement to have a meeting to discuss the compilation of the record with the respondents as is required by rule 11(10). Thereafter, the legal practitioner followed up with Tunga on the progress relating to the completion of the record intermittently on a weekly basis. It seems that due to an incorrect reference number, the court file at the court *a quo* could initially not be traced and thereafter it was the turn of the employee at Tunga charged with the compiling of the record to go on leave for a few days. On this employee’s return to work, the record was finalised and filed within two days namely on 2 February 2018.

[8] On the above version, Tunga compiled the record within two months after they were approached on 13 December 2017 and the record was filed on 2 February 2018. This is despite the fact that Tunga must have been closed, at least, for the usual public holidays over December and January and that they spent as least some time on unnecessary transcription of arguments in the court *a quo* because the legal practitioner instructing them did not inform them not to do so as he should have done.

[9] It is clear that the attempt to attribute the delay to Tunga is not acceptable. This is an attempt to hide the inaction of the legal practitioner involved. A notice of appeal was filed on 8 November 2017, yet Tunga was only approached five weeks later, on 13 December 2017 to prepare the record. It is self-evident that, but for this delay, the record would have been filed timeously. And what is the legal practitioner's explanation for this? Nothing - only a deadly silence. There is simply no explanation, never mind an acceptable one.

[10] In short, what the court is faced with is a fairly detailed explanation of what Tunga did in compiling the record which took about six weeks of the prescribed three months to file a record, a month ascribed to the traditional summer holiday which coincides with the period the matter was left in the hands of Tunga and no explanation at all for the period that the matter was in the hands of the legal practitioner from the filing of the notice of appeal on 8 November 2017 until Tunga was approached on 13 December 2017, ie about five weeks. It goes without saying

that, but for this omission by the legal practitioner of the Authority, the record would have been completed timeously, had Tunga been approached much earlier.

[11] The explanation for the late filing of the record thus cannot be said to be a full and satisfactory explanation and in fact as far as the crucial period is concerned, no explanation at all is tendered. Furthermore, the non-compliances other than the late filing of the record are not addressed at all - with the result that there is no explanation in respect of any of the non-compliances. It thus follows that the condonation application is bound to fail irrespective of the prospects of success on appeal.

[12] In the result, the application for condonation for the late filing of the record and the reinstatement of the appeal is dismissed with costs. For the benefit of the taxing master, it is mentioned that after the withdrawal of the respondents' legal practitioner on record, the respondents did not engage another legal practitioner and appeared in court in person when the matter was called.

FRANK AJA

SHIVUTE CJ

HOFF JA

APPEARANCES

APPELLANT:

S Rukoro

Instructed by Tjituri Law Chambers,

Windhoek

FIRST – THIRD RESPONDENTS:

In Person