



NOT REPORTABLE

CASE NO: SA 14/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PETRUS MARTIN

Appellant

and

SHOPRITE NAMIBIA (PTY) LTD

Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 11 November 2020

Delivered: 4 December 2020

Summary: This appeal arises from a damages claim by the respondent against the appellant, due to appellant's breach of his fiduciary duty, by failing to ensure proper stock control which led to losses of merchandise stock. Both the notice of appeal and the record of appeal were filed outside their required time periods, resulting in the appeal lapsing in both instances. Two condonation and reinstatement of appeal applications were filed for appellant's non-compliance with the Rules of the Supreme Court. The application for condonation and

reinstatement of appeal in respect of the late filing of the notice of appeal is opposed by the respondent.

The two-pronged nature of the test for condonation applications is well settled and requires the applicant to: (1) provide a reasonable and acceptable explanation for the non-compliance and (2) show that there is reasonable prospects of success on appeal. Whilst these considerations are not generally considered in isolation, there are times when an unacceptable explanation is so glaring or flagrant, that the application may be dismissed without consideration of the prospects of success on appeal.

In the present matter, the first condonation application for the non-compliance to file the notice of appeal in compliance with the rules is based upon a failure by the practitioner to consult rule 7(3)(c)(iii) prior to filing the initial notice and did so only after he was alerted to its defective nature. It is apparent from the explanation that the practitioner had not bothered to look at the rule until after the non-compliance was raised with him.

Held that, it is the duty of a legal practitioner taking instructions to appeal to this court, to acquaint himself or herself with the rules of this court.

Held that, an explanation amounting to ignorance of the rule in question on the part of a practitioner is found to amount to no explanation and is not reasonable nor is it acceptable – see *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another*.

Held that, the non-compliance with rule 7 in this matter was not satisfactorily explained and that the first application for condonation and reinstatement of the appeal is therefore dismissed.

It is accordingly not necessary to consider the further application for condonation and reinstatement of the appeal for the late filing of the record of appeal.

Appeal is struck from the roll.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] This appeal arises from a damages action by a retail group against a former branch manager for breaching his fiduciary relationship by failing to ensure proper stock control which led to losses of merchandise stock valued at N\$84 303 and N\$133 017. But there are preliminary matters in the form of two condonation applications first to be addressed.

[2] These condonation applications are coupled with applications for reinstatement of the appeal as the appellant's non-compliance with the rules of this court had resulted in the appeal lapsing in both instances. The first of these is in respect of the late filing of the notice of appeal and the second relates to the late filing of the record of appeal.

[3] The two-pronged nature of the test for condonation applications is well settled. In the first place, an applicant must provide a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of success on appeal. Whilst these considerations are not generally considered in isolation, there are times where an unacceptable explanation is glaring or flagrant, the application may be dismissed without consideration of the prospects of success on appeal.¹

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

[4] The first condonation and reinstatement application (in respect of the late filing of the notice of appeal) is opposed.

[5] The facts relevant to it can be briefly stated. The High Court handed down its order on 1 February 2019, followed by providing its reasons on 12 February 2019 which were in turn provided by the appellant's legal practitioner to him on the same date. The appellant's legal representation in his trial was provided through the Directorate of Legal Aid. The appellant's practitioner informed him simultaneously on 12 February 2019 of the need to obtain an authorisation from the Directorate for financial support for an appeal without delay as the notice of appeal was due on 13 March 2019. A notice was filed on 13 March 2019. The appellant's practitioner explains that this occurred on the last day because he had experienced difficulty in communicating by telephone and fax with the Directorate during the period 13 to 21 February 2019, because of malfunctioning telephone lines during that period.

[6] The appellant's practitioner states that he caused a letter to be hand delivered at the Directorate's office on 27 February 2019 alerting that office to the fact that a notice of appeal was due on 13 March 2019. Quite why this could not have been done during the period 13 to 21 February 2019 and occurred only on 27 February 2019 is not explained. He states that he received the authorisation to proceed with an appeal from the Directorate on 12 March 2019 and he finalised a notice on the same day which he sent by email to his firm's Windhoek office as he had since October 2018 been stationed at his firm's Ongwediva office.

[7] After the notice was filed, he was cautioned by a senior practitioner in his firm that the notice may be defective.

[8] Then follows a telling statement in the appellant's legal practitioner's affidavit:

'I was able to peruse both the notice of appeal and the rules (of this court) on 14 March 2019, in particular, rule 7 (3)(c)(ii).'

[9] This from the practitioner who drafted the notice and caused it to be filed.

[10] The practitioner states that he thereafter discussed the matter with his colleagues on 18 March 2019 and concluded that the notice was defective. The practitioner then states that he telephoned the appellant, based in Otjiwarongo and requested his instructions and was informed that those would be provided the following day. The next step taken by the practitioner, as stated in his affidavit, was to telephone the appellant on 20 March 2019 only to be told that the latter had not 'come to a firm position on whether the notice . . . should be withdrawn or not.' On 25 March 2019, the appellant reverted to his practitioner and 'endorsed' the view that the notice was defective and should be withdrawn.

[11] A notice of withdrawal of the notice of appeal was however only filed on 5 April 2019. The explanation given for this delay was that the practitioner had 'pressing' work commitments and only came to redraft the notice of appeal on 30 March 2019 and after 1 April 2019 continued with that drafting as well as preparing an application for condonation. He states that the affidavit in support of that

application was prepared on 4 April 2019 and forwarded to the appellant for verification of portions relating to him. In their telephone discussion of that date, the appellant stated that he was not feeling well. His practitioner states he next received an SMS from the appellant to the effect that he was admitted to hospital and not in a position to depose to an affidavit.

[12] The appellant's practitioner sought to file a new notice on 11 April 2019 but was informed by the registrar of this court that it would not be filed without an application for condonation. The next event referred to in his affidavit was the receipt of another 'sms' on 14 April 2019 from the appellant that he had been discharged from hospital and would be booked off work until 26 April 2019 but was on medication which caused drowsiness. On 24 April 2019, the appellant eventually considered the draft affidavit which was updated and deposed to on 25 April 2019.

[13] According to the appellant, 24 April 2019 was the earliest date upon which he was physically able to proceed to his workplace to obtain a copy of his doctor's certificate. That certificate, referred to in his confirmatory affidavit, was however not included in the record prepared at his instance. The appellant's ailment is also not explained in the condonation application, not even in his own confirmatory affidavit. That certificate was however traced on the court file in an unbound loose copy of the application and, apart from a reference on it to haemorrhoidectomy, no further explanation is provided. This is but one of several unsatisfactory features of the explanation proffered for non-compliance with rule 7.

[14] The new notice of appeal was eventually lodged on 7 May 2019. In the respondent's answering affidavit, the appellant's practitioner's explanation and conduct are subjected to severe criticism. It is correctly pointed out that the explanation for the delay and failure to comply with rule 7 was on the facts of this case a matter to be addressed by the practitioner and not the appellant, as was the case with the formulation of the notice of appeal and import of rule 7(3).

[15] In addition to these shortcomings, no explanation at all is tendered for the further delay between 25 April 2019 and 7 May 2019.

[16] It is certainly not explained quite why the wording of the notice of appeal to ensure compliance with rule 7(3) was a matter referred to for advice, input and instructions from a lay client.

[17] Most importantly however is the statement by the practitioner that the relevant rule was consulted the day after the initial notice was filed and that it was only after considering that rule that he chose to seek further advice from colleagues on the rule's requirements and reached a conclusion on 18 March 2019 that the position needed to be rectified.

[18] The duty upon legal practitioners to acquaint themselves with the rules has been repeatedly and emphatically stressed by this court² and the position very

² *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others* 2013 (4) NR 1029 (SC); *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC); *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 34; *Tweya & others v Herbert & others* (SA 76/2014) [2016] NASC (6 July 2016).

recently again summarised in *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another*³ with reference to leading prior judgments in the following way:

[8] In *Channel Life Namibia Ltd v Otto* 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.”

[9] In *Kleynhans v Chairperson of the Council of the Municipality of Walvis Bay & others* 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.”

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* 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

³ (SA 26/2018) [2019] NASC (9 December 2019) paras 8 – 11.

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."

[11] In the *Katjaimo v Katjaimo* 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."

(footnotes excluded)

[19] In the first condonation application, the explanation for the non-compliance with the rule is based upon a failure to consult the rule in question (rule 7(3)(c)(iii)) prior to filing the initial notice and then only after the practitioner was alerted to its defective nature. It is thus apparent from the explanation that the practitioner had not bothered to look at the rule until after he had been required to comply with it (and his non-compliance was raised with him).

[20] The duty upon a practitioner taking instructions to appeal to this court is to acquaint himself or herself with the rules of this court. But in this instance, the practitioner plainly did not acquaint himself with rule 7 before seeking to file a notice of appeal. This unacceptably remiss approach is compounded by the ensuing delay – much of which is not adequately explained – to endeavour to rectify the non-compliance with the rule.

[21] The frequent warnings of this court concerning the laxity of practitioners in acquainting themselves with and acting in accordance with the rules of this court, reiterated again recently in *Sun Square*, require implementation. As occurred in *Sun Square*, an explanation amounting to ignorance of the rule in question on the part of a practitioner was found to amount to no explanation and is not reasonable and not acceptable. As was made clear in *Sun Square*, if an explanation of this nature (ignorance of a rule) for failing to comply with the rule in question were to be accepted, this court would be obliged to accept every other explanation for failing to comply with the rules.

[22] It follows that the non-compliance with rule 7 was not satisfactorily explained and that the first application for condonation and reinstatement of the appeal is to be dismissed for this reason alone. It is accordingly not necessary to consider the further application for condonation and reinstatement of the appeal for the late filing of the record.

[23] As for costs, it was confirmed that the appellant's legal representation is provided with the support of the Directorate of Legal Aid and that no order of costs should be given.

[24] The following order is made:

- (a) The application for condonation and reinstatement of the appeal relating to the late filing of the notice of appeal is dismissed, with no order as to costs.

- (b) The appeal is struck from the roll.

SMUTS JA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES

APPELLANTS:

E Shikongo

Of Shikongo Law Chambers,
Windhoek

RESPONDENT:

K Haraseb

Of ENSafrica|Namibia, Windhoek