

**REPORTABLE**

CASE NO: SA 84/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JUDITH VERONICA NOAGUS DE SOUSA**

**Appellant**

and

**ALEXIA PROPERTIES CC**

**Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and UEITELE AJA

**Heard:** 19 July 2021

**Delivered:** 27 July 2021

**Summary:** The legally-aided appellant withdrew an appeal and the respondent seeks a costs order *de bonis propriis* against the appellant's legal practitioner for wasted costs incurred by the respondent due to the alleged late withdrawal of the appeal. Respondent's legal practitioner maintains that the appellant's legal practitioner was negligent and malicious by withdrawing the appeal only a day before the respondent was due to file its heads.

It is common cause that the appellant's legal practitioner failed to file the heads when it was due. Not only had the appeal lapsed, necessitating a condonation and reinstatement application, but the appellant's legal practitioner failed to file heads

of argument on due date in respect of the condonation and reinstatement application. The Chief Justice directed that the rule 17 regime was applicable *mutatis mutandis*.

*On appeal*, Court sets out the test for the granting of an order of costs *de bonis propriis* against a legal practitioner:

*Held that* when an appeal has lapsed and it cannot be revived without condonation and reinstatement, absent such an application it will not be heard, and a respondent is not expected to prepare for it. Similarly, once the application has been set down and an appellant fails to file heads or argument as directed by the court, the condonation and reinstatement application will not be heard. A respondent therefore need not prepare in either case. Costs incurred in those circumstances are not recoverable.

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## APPEAL JUDGMENT

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DAMASEB DCJ (MAINGA JA & UEITELE AJA concurring)

### Introduction

[1] We are called upon to grant an order of costs *de bonis propriis* against a legal practitioner in respect of an aborted appeal which was set down to be heard on 18 June 2021. The appellant had obtained legal aid to prosecute an appeal against a judgment and order of the High Court. Ms C Kavitjene of Tjombe-Elago Inc. (the firm) was appointed by the legal aid directorate to conduct the appeal on behalf of the appellant. The basis of the order being sought against Ms Kavitjene (and or the firm) is that she allegedly failed to take reasonable and appropriate steps to inform the legal practitioner for the respondent that the appeal will not be proceeded with.

[2] That failure, it is alleged, resulted in the respondent's legal practitioner of record instructing the instructed legal practitioner to prepare heads of argument for the appeal. In other words, that the respondent was forced to incur costs which it would not have, had Ms Kavitjene made it known in good time that the appeal would not proceed.

In what circumstances may such an order be granted?

- [3] A legal practitioner may be held personally liable for litigation costs where:
- (a) There is malfeasance in the form of negligence or dereliction of duty such as non-observance of court orders and rules of court;
  - (b) The court wishes to sanction the malfeasance as a mark of its disapproval;
  - (c) The malfeasance cannot be directly attributed to the litigant, or the legal practitioner contributed to or played a part in it;
  - (d) The conduct is sufficiently serious and unacceptable from an officer of the court;
  - (e) The conduct unduly and unnecessarily led to increasing litigation costs; and
  - (f) The innocent party could not with diligent foresight avoid incurring the wasted costs.

(Compare: *Aztec Granite (Pty) Ltd v Green & others* 2006 (2) NR 399 (SC) at p 405D-E; *Katjaimo v Katjaimo* 2015 (2) NR 340 (SC) at p 351B-D; *Darries v Sheriff*,

*Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at p 44J-45A and *Machumela v Santam Insurance Company Ltd* 1977 (1) SA 660 (A) at p 660B-C; *SA Liquor Traders' Association & others v Chairperson, Gauteng Liquor Board & others* 2009 (1) SA 565 para [54]).

#### Factual background

[4] The appellant lodged an appeal against a judgment of the High Court on 13 December 2019. It is common cause that subsequent to noting the appeal there was a failure to file the record of appeal on due date which was 3 March 2020. As a result of the admitted non-compliance, on 18 May 2020 the appellant filed an application for condonation and reinstatement of the appeal, together with the record of appeal.

[5] On 14 April 2021, the Registrar of this court gave notice to the parties that the application for condonation and reinstatement of the appeal had been set down for hearing on 18 June 2021. In the notice the parties were informed that the Chief Justice directed that rule 17(1), 17(2)<sup>1</sup> and 17(3) of the Rules of the Supreme Court of Namibia would *mutatis mutandis* apply to the application. That meant that the appellant was to file heads of argument by 18 May 2021 and the respondent by not later than 3 June 2021.

[6] The significance of the reference to rule 17(2) (and its application *mutatis mutandis*) in the context of the appellant's application for condonation and reinstatement is that where such an applicant fails to file heads of argument as

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<sup>1</sup> Which states: '(2) If the appellant fails to lodge heads of argument within the time allowed, for the lodging of heads of argument in subrule (1) or as directed by the Chief Justice or a judge or judges designated by the Chief Justice, the appeal lapses.'

directed, no proper application for condonation and reinstatement is pending before the court. The relevance of this will soon become apparent.

#### The respondent's affidavit

[7] In an affidavit deposed to Mr U Nakamhela of Nakamhela Attorneys (Mr Nakamhela) in support of the special costs order, it is alleged that based on the letter from the Registrar, he instructed senior counsel on 29 April 2021 to draft the respondent's heads of argument.

[8] The appellant's heads of argument were not filed on 18 May 2021 when they were due. Therefore, on 28 May 2021, upon being informed by the instructed legal practitioner that he could not finalise the heads of the respondent without those of the appellant, Mr Nakamhela inquired from Ms Kavitjene when appellant's heads would be filed. Ms Kavitjene informed him that she would file by 31 May 2021. (Obviously, Mr Nakamhela did not ask the correct question. The correct question ought to have been whether Ms Kavitjene intends to bring an application for the condonation of the failure to file the heads of argument so as to resuscitate the condonation and reinstatement of the appeal).

[9] On 1 June 2021, Ms Kavitjene still had not filed the heads. Mr Nakamhela then again inquired from her and was informed that she was awaiting an answer from the Directorate of Legal Aid. Mr Nakamhela found this to be strange as Ms Kavitjene had at no point indicated that the drafting or filing of the heads was subject to a response from the Directorate of Legal Aid. Mr Nakamhela further contents that his astonishment was due to the fact that in a letter dated 11 March

2020 Ms Kavitjene had confirmed that the firm had instructions to prosecute the appeal.

[10] Mr Nakamhela states further that to his 'bewilderment' the firm on 2 June 2021 filed a notice withdrawing the appeal but that he only received the notice on 3 June 2021. According to Mr Nakamhela, the withdrawal only came to his attention when his candidate legal practitioner was attending to filing the respondent's heads of argument at the Law Society where legal practitioners serve each other court documents.

[11] Mr Nakamhela contends that despite the various communications with Ms Kavitjene, including the conversation on 1 June 2021 and having expressed his concerns about the fact that appellant was late in filing the heads of argument, she at no point alerted him to the possibility that the appeal might be withdrawn.

[12] Mr Nakamhela maintains that the withdrawal of the appeal was done extremely late, and that the respondent has been severely prejudiced and has incurred substantial wasted costs due to the 'reckless conduct' of Ms Kavitjene.

[13] According to Mr Nakamhela, the fact that Ms Kavitjene filed the notice of withdrawal at the Law Society without informing him personally was done deliberately and in disregard of his client. He asserts that a mere phone call or text message alerting him that the appeal was being withdrawn or at least that there were doubts as to prospects on proceeding with the appeal would have enabled him to advise the instructed legal practitioner not to incur the costs of preparing the

heads of argument. The deponent maintains that Ms Kavitjene's conduct deserves censure with punitive costs order *de bonis propriis* on attorney-own-client scale.

Answering affidavit

[14] Ms Kavitjene filed an answering affidavit resisting the special costs order and to meet the allegations made by Mr Nakamhela. According to her, in terms of rule 17(2) the 'appeal' had automatically lapsed when the appellant's heads were not filed when they fell due. It was thus unnecessary for the respondent's legal practitioner to have taken any of the steps he did after the appellant's heads of argument were not filed. In other words, that the respondent failed to mitigate its costs by proceeding to prepare heads of argument for the appeal. In the view that I take of this defence raised by Ms Kavitjene, I find it unnecessary to recount her other averments intended to justify her conduct in the matter.

[15] Suffice to say that she states that because Mr Nakamhela had on an earlier occasion questioned if the firm was authorised by Legal Aid to prosecute the appeal on behalf of the respondent and that, absent such authorisation, security for costs had to be paid by the appellant, she made endeavours to obtain clarity from Legal Aid.

[16] Those efforts resulted in her contacting Mr Nakamhela on 1 June 2021 to inform him of the likelihood that the appeal would be withdrawn. The notice withdrawing the appeal was then filed of record on 2 June 2021 at 14h03 at the

Law Society. Ms Kavitjene maintains that her actions were in the circumstances not negligent.

[17] As I understand Ms Kavitjene's case further, the reliance on the late withdrawal of the appeal is simply a ruse to hide the fact that Mr Nakamhela was determined at all costs (as she puts it 'maliciously') to get costs *de bonis propriis* against the firm. She relies for that allegation on the fact that (a fact not disclosed by Mr Nakamhela in his founding affidavit) as far back as 15 January 2020, he wrote:

'Our Instructions are that the appeal is frivolous and vexatious as contemplated in Rule 6 of the Supreme Court Rules. We feel compelled to advise the partners of Tjombe-Elago Inc, as we hereby do, that should the appeal not be withdrawn by close of business on Friday 17 January 2020, our instructions are to bring an application in terms of the above-mentioned Rule 6 and ask for a costs order *de bonis propriis* of Tjombe-Elago Incorporated.'

#### Replying Affidavit

[18] In the replying affidavit, Mr Nakamhela asserts that in none of the correspondence or verbal communications between himself and Ms Kavitjene, after they received the letter from the Registrar informing them that the matter was set down for hearing on 18 June 2021, did Ms Kavitjene express doubt that the appeal will proceed. That, he maintains, undermines the suggestion that it was unnecessary for him to proceed to have the heads of argument prepared.

[19] As for the letter of 15 January 2020 threatening the firm with a punitive costs order *de bonis propriis*, Mr Nakamhela contends that it was not concealed from the court and that its purpose was to mitigate or avoid the financial damage



to the parties concerned and to afford the appellant's practitioners an opportunity to avoid such costs.

#### The hearing

[20] Mr Corbett filed helpful written heads of argument and argued the matter in support of the respondent's application for the special costs order. Ms Kavitjene on the other hand did not file written submissions, suggesting that it is because the court had not given any directions therefor. That may be so, but the importance of written submissions cannot be over-emphasised. It assists the court to prepare and to know in advance where a party's emphasis will lie: what it concedes and what it persists with and the authorities that will be relied upon. As it happens, she placed reliance on case authority whose citation she did not have readily available – much to the frustration and inconvenience of the court.

[21] Mr Corbett placed accent on the fact that the appellant's failure to comply with its obligations as directed by the court did not absolve the respondent of its duty to do so and that the preparation of the heads was a reasonable precaution in the circumstances. Mr Corbett added that if there is concern that the steps taken after 1 June 2021 might have been unnecessary in view of Ms Kavitjene's advice to Mr Nakamhela on 1 June 2021, that still does not detract from the fact that preparatory work must have occurred prior to that date; and that it would in such circumstances be justified for the court to still make an appropriate costs order and leave the matter to taxation so that the taxing officer only allows such costs as may have been incurred prior to 1 June 2021.

[22] Ms Kavitjene opposed the order sought by the respondent and in essence repeated by way of submission the grounds set out in her opposing affidavit.

### Analysis

[23] The judgment of the High Court being appealed against was delivered on 3 December 2019, which means that the appeal record was to be filed by not later than 3 March 2020.<sup>2</sup> The record of appeal was only filed on 18 May 2020, together with an application for condonation and reinstatement. In terms of rule 9(1)(b), where an appellant fails to file the record, the appeal is deemed to have been withdrawn.

[24] Where there has been non-compliance with the rules governing appeals, the appeal lapses.<sup>3</sup> The reason the appellant brought an application for condonation and reinstatement is because the appeal had lapsed. Once an appeal has lapsed it can only be reinstated when a litigant has sought and has been granted condonation. Until such time that condonation and reinstatement has actually been granted, there is no appeal pending before this court. What is pending is only the application for condonation and reinstatement although in practice the court considers the condonation alongside the merits because prospects of success are ordinarily important in such an inquiry.

[25] As I have demonstrated in para [6] above, the practice of this court is to subject an application for condonation and reinstatement to the same regime as an appeal proper on the merits. Once an appellant whose appeal has lapsed has

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<sup>2</sup> Rule 8(2)(b) of the Supreme Court Rules.

<sup>3</sup> *Ondjava Construction CC & others v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC).

applied for condonation and reinstatement and a date has been allocated, heads of argument must be filed in terms of rule 17 and if an applicant fails to do so it spells the end of the application for condonation and reinstatement. The court's indulgence is required for the matter to proceed further. The court does not *mero moto* condone non-compliance with its rules.<sup>4</sup>

#### The law to the facts

[26] The appellant's application for condonation and reinstatement was to be considered as the first order of business on the set down date of 18 June 2021. Now, whilst still awaiting the grant of the court's indulgence on the set down date, the appellant again failed to file heads of argument which were due on 18 May 2021. Those heads were intended to persuade this court of the merits of the condonation and reinstatement application. Mr Nakamhela does not explain on what basis he assumed after 18 May 2021 - in the absence of yet another condonation application – that this court could have entertained the respondent on the set down date. That put paid to the suggestion by Mr Corbett during oral argument that it must be assumed that some work was done prior to 1 June 2021, which is the date on which Ms Kavitjene informed Mr Nakamhela that there was a possibility that the appeal will be withdrawn.

[27] A condonation application is a condition precedent to revive a lapsed appeal. The same applies to a condonation and reinstatement application where the party seeking the indulgence fails to comply with rule 17(2) as directed by the Chief Justice. It means that until condonation is granted there is no appeal or

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<sup>4</sup> *Kamwi v Duvenhage & another* 2008 (2) NR 656 (SC).

condonation and reinstatement application before this court. These are not meaningless *dicta*. They have real and practical consequences. If an appeal has lapsed, this court does not and will not set it down; and the same applies to an aborted condonation and reinstatement application. The court does not expect of a respondent to an appeal to prepare for such an appeal.

[28] We must accept on the *Plascon-Evans* test that Ms Kavitjene on 1 June 2021 informed Mr Nakamhela that the appeal might be withdrawn. On the premise that Ms Kavitjene informed Mr Nakamhela on 1 June 2021 that the appeal might be withdrawn, any work in preparation of the heads of argument after that date would equally have been entirely unnecessary.

[29] This, in my view, is a case where the respondent stood no risk of an appeal being entertained by this court on the set down date. It would have sufficed, as often happens, for Mr Nakamhela to simply direct Ms Kavitjene's attention, with a copy to the court's registrar, to the fact that (a) the appeal had already lapsed, (b) that there was or could possibly be no condonation and reinstatement on account of the failure to file the heads on 18 May 2021, and (c) that no future steps will be taken on behalf of the respondent – in order to save costs.

[30] The true motivation for the order sought against the firm appears to be the opposing side's view that the appeal had no merit and was frivolous and vexatious. The events which unfolded after the application for condonation and reinstatement was set down appear to have provided a convenient avenue to vent that frustration. I say so because it is not clear to me on what basis the threat was

made to pursue a *de bonis propriis* costs order against the firm after it had accepted the mandate from legal aid to represent the appellant in the appeal. One would have thought that such a threat would in the first place have been directed at the litigant personally – considering that it was argued before us on behalf of the respondent that a legally aided person is not shielded from costs by virtue of the provisions of s 18 of the Legal Aid Act 29 of 1990<sup>5</sup>.

[31] I come to the conclusion therefore that the application must fail.

#### Costs

[32] Although the firm achieves success in opposing the application brought by the respondent, it bears mention that that success is not a vindication of the manner in which Ms Kavitjene conducted the appellant's appeal. She could have been more forthcoming and showed professional courtesy to her opposite number than what the evidence in the application discloses. I have also already mentioned her lack of courtesy towards the court as regards heads of argument in the application. This is therefore a proper case for denying a successful party its costs.

#### The order

[33] I would therefore propose the following order:

- (a) The respondent's application for costs *de bonis propriis* against Tjombe-Elago Inc and/or Ms C Kavitjene, is dismissed.

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<sup>5</sup> **'State not liable for costs**

**18.(1)** No order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings.'

(b) There is no order as to costs.

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**DAMASEB DCJ**

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**MAINGA JA**

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**UEITELE AJA**

APPEARANCES

APPELLANT:

C Kavitjene

Of Tjombe-Elago Incorporated

RESPONDENT:

AW Corbett

Instructed by Nakamhela Attorneys