



REPORTABLE

CASE NO: SA 72/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PIO MARAPI TEEK

First Appellant

PIA MBEMURUKIRA TEEK
Appellant

Second

and

JOHN WALTERS

First Respondent

EILEEN RAKOW

Second Respondent

Coram: SAKALA AJA, SHONGWE AJA and CHINHENGGO AJA

Heard: 8 March 2021

Delivered: 8 March 2021

Reasons: 29 April 2021

Summary: The appellants are appealing against the whole judgment *a quo* which dismissed their claim, in which, they brought an action for damages for defamation in the amount of N\$6 000 000. Before the hearing, the appellants filed a number of documents with the registrar of the Supreme Court, namely,

1. Notice of appeal, dated 18 December 2018.
2. Appeal record, dated 21 November 2019.
3. Notice of set-down and objection to Namibian Justices coram, dated 27 August 2019.

4. Notice applying for enrolment, condonation and re-instatement, dated 22 January 2021.

The case was set down for 8 March 2021 and the appellants filed their heads of argument on 22 January 2021. The respondents thereafter filed their heads of argument on 22 February 2021 in which they challenged the condonation affidavit on the basis that firstly, they were never served with the notice of appeal or the record and that secondly, the record which was filed was incomplete as it omitted some evidence and certain documents used in the trial court.

The respondents further argued that due to the fact that the record was incomplete and defective, the appeal is deemed to have been withdrawn in terms of rule 9(1) and (4), alternatively that the appeal was not properly before the court.

The respondents further argued that the appellants failed to comply with rule 14(2) as no security was entered and no condonation was sought for this failure. The appellants in their defence argued that they had inadequate time to file the security or condonation and further asked for the matter to be removed in order to afford them an opportunity to file an affidavit.

Held that, the appellants had adequate time as they had about two weeks to file the documents which were raised by the respondents in their heads of argument, therefore the argument is unjustified.

On the day of hearing after submissions were made by the parties, the court handed down an order in which it struck the matter off the roll and ordered the appellants to pay the respondents wasted costs of appeal jointly and severally.

Held further that, as a retired judge, the first appellant ought to be conversant with the rules of the court, specifically rule 8(2).

REASONS

SAKALA AJA (SHONGWE AJA and CHINHENGO AJA concurring):

[1] This appeal was enrolled for hearing of arguments on 8 March 2021. On that day, the appellants appeared in person and Ms Bassingthwaite appeared for the respondents.

[2] The brief facts of the matter, in so far as they are relevant, are that the first appellant, a retired Judge of the Supreme Court of Namibia and the second appellant, a lecturer and a biological daughter of the first appellant appealed to the Supreme Court against the whole judgment of the court *a quo* dismissing their claim in the amount of N\$ 6 000 000 for an allegedly defamatory statement made in plea filed on behalf of the first respondent in another matter before the High Court under case no: I 3265/2013.

[3] The judgment appealed against was delivered on 23 November 2018. The appellants lodged a notice of appeal on 18 December 2018. The appeal record was lodged on 21 February 2019. On 27 August 2019, the appellants filed a notice headed: 'NOTICE OF SET-DOWN AND OBJECTION TO NAMIBIAN JUSTICES CORAM'.

[4] According to the notice, the appellants were objecting 'to a Bench consisting of Permanent/Contracted Namibian Justices to be assigned and seized with the appeal in casu'. The scathing tone of the grounds and reasons in support of the objection to the Namibian justices cannot be repeated here. But we cannot accept that this appeal was assigned to a Bench comprising non-resident judges for the reasons claimed by the appellants in their notice.

[5] To continue with the sequence of events, on 22 January 2021, the appellants lodged a notice applying for enrollment, condonation and re-instatement of the appeal. In paragraph three of the affidavit supporting the application, the appellants explain as follows:

'The purpose of this Application is to ask this Hon. Court's: Re-enrollment, Condonation for non-compliance with the Hon. Court's Rules and Re-instatement of the appeal, dated and filed on 18/12/2018; on the following Grounds and Reasons that I:

3.1 rely on the Contents contained in the Particulars of Claim and Annexures thereto;

3.2 on 18/12/2018, filed and served the Record upon relevant Respondents. The Judgment was delivered on 23/11/2018;

3.3 on 02/12/2020, received communication from the Registrar that the Application for Condonation and Re-instatement of the appeal has been set for hearing on 5 March 2021, [*vide* "A", hereto] and

3.4 the availability of Foreign Justices to serve on the Bench of the Case and the Impact of the Restrictions, Measures and Lockdowns imposed in combating the Corona Virus, in the Country, contributed to the delay [*vide* "A1", hereto].

In the premises, we have reasonable Prospects of Success on appeal. Wherefore, I humbly pray for an Order condoning the non-compliance with the Rules of the Hon. Court, Re-instatement and hearing of the appeal. At no stage did we entertain the Intention to withdraw or abandon the appeal. There is no prejudice to **Respondents**, as we have tendered a plausible and reasonable explanation. Therefore, we regret the non-compliance with the Rules and the delay in the prosecution of the appeal. We humbly pray for the Hon. Court's indulgence.'

[6] It is unclear to us how the availability of non-resident justices to serve on the Bench of the case and the impact of the restrictions, measures and lockdowns imposed in combating the corona-virus in the country contributed to the delay.

[7] But be that as it may, on the same 22 January 2021, the appellants filed their heads of argument. In these heads, no reference is made to the application for condonation.

[8] The respondents on the other hand filed their heads of argument on 22 February 2021, a month after the appellants' heads of argument had been filed. In their heads of argument, the respondents legal representative challenged the application for condonation, contending that they were not served with the notice of appeal, nor the record of appeal; pointing out that the record is substantially incomplete as the transcribed record of oral evidence is not in the record; that the record does not contain any of the exhibits admitted into evidence during trial; that the record of appeal also contains correspondence which should not be in the record; and that the record of appeal contains mere formal documents that need not be in the record as contemplated in rule 11(5). Counsel explained that all these were discovered whilst perusing the record on 20 February 2021 and while drafting the heads of argument.

[9] Counsel further pointed out that due to the fact that the record was incomplete and defective, the appeal is deemed to have been withdrawn in terms of rule 9(1) and (4) of the Supreme Court Rules; alternatively that the appeal was not properly before the court.

[10] Counsel also pointed out that the appellants failed to comply with rule 14(2) and (3) in that they have not entered any security for costs of the respondents and that no condonation was sought for this failure.

[11] Counsel indicated that ordinarily, the court would consider prospects of success of the appeal when considering an application for condonation; but that in the present case, this is not possible because the record does not contain oral or documentary evidence. Counsel urged the court to dismiss the appeal without considering the merits.

[12] On 8 March 2021, when the matter was called, the first appellant stood up and took up a different stance in the whole matter. Firstly, he reluctantly acknowledged that the record of appeal was incomplete and defective; and that there was failure to provide security for costs in terms of the rules. He however argued that this was due to time constraints. Secondly, he complained that the respondents only raised the issues one month after the appellants had filed their heads of argument. Thus, instead of arguing the application for condonation, the first appellant applied to court for the matter to be removed from the roll to enable him to file an affidavit to address the issues raised by the respondents in their heads of argument.

[13] On the complaint relating to inadequate time, we must at once say that we do not agree that the appellants did not have enough time. We take note that the respondents filed their heads of argument on 22 February 2021.

[14] This matter was set down to be heard on 8 March 2021. The appellants had about two weeks within which they would have reacted to the issues raised in the heads of argument of the respondents. This they did not do. Even here in court, on the date set for hearing the matter, the appellants did not give any explanation for non-compliance with the rules. Instead, they applied for the matter to be removed from the roll.

[15] The complaint relating to inadequate time within which the appellants would have responded to issues raised in the respondents' heads of argument is unjustified in our view.

[16] On behalf of the respondents, Ms Bassingthwaighte filed two authorities before addressing the court. These cases deal with condonation. On account of what we have said *supra* on the issue of condonation and on account of the stance now taken by the appellants, we find it unnecessary to discuss the two authorities.

[17] In her brief oral submissions, counsel for the respondents pointed out that the issue of an incomplete record had been raised in the respondents' heads of argument filed on 22 February 2021. Counsel however, informed the court that she had no objection for the matter being removed or struck from the roll as long as the costs were awarded to the respondents. After hearing oral arguments in this matter, the following order was made on the date of hearing:

'Having heard the first appellant in person and Ms Bassingthwaighte for the respondents and having read the record of appeal and other documents filed herein:

IT IS ORDERED THAT:

- (a) The matter is struck off the roll.
- (b) The appellants shall pay the respondents' wasted costs of appeal jointly and severally the one paying the other to be absolved.
- (c) Reasons of this order to follow in due course.'

[18] We now give the reasons for the order. As already indicated *supra*, the first appellant is a retired judge of the Supreme Court of Namibia, while the second appellant is his biological daughter. All along in this matter, the first appellant has appeared in person and on behalf of the 2nd appellant. They lodged a notice of appeal in this court in person. The 1st appellant prepared and lodged the record of appeal as well as the application for condonation in person.

[19] In these circumstances we are entitled to assume that the first appellant, as a retired judge of this court must be conversant and knowledgeable of rule 8(1) of the rules of this court which requires that an appellant must lodge four copies of the 'record of proceedings in the court appealed from'.

[20] We have no doubt that the first appellant knows the reason for this rule. We also assume, rightly so, that the first appellant, knows that the lodging of a defective record of appeal amounts to non-compliance with rule 8(2) resulting in the lapsing of an appeal.

[21] From the defects set out in the respondents' heads of argument, it is clear to us that the record of appeal in this matter is incomplete and defective and therefore not the 'record of the proceedings in the court appealed from'. We are shocked, however, that even after the serious failures to comply with the rules of the court were pointed out to the appellants, two weeks in advance of the hearing, through the respondents' heads of argument, the failures remained unaddressed

on the date of hearing the matter and no attempts were made to address those failures.

[22] Given the fact that the first appellant asked the court to strike the matter from the roll and there having been no objection, we thus made the order in paragraph 17.

SAKALA AJA

SHONGWE AJA

CHINHENGO AJA

APPEARANCES:

1st and 2nd Appellants:

In Person

Windhoek

1st Respondent:

N Bassingthwaigte

Instructed by Ellis Shilengundwa Inc

Windhoek