



REPORTABLE

CASE NO: SA 45/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SOLSQUARE ENERGY (PTY) LTD

Appellant

and

HANS IVO LÜHL

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 31 March 2021 and 4 October 2021

Delivered: 25 August 2022

Summary: In an application for condonation for the filing of an incomplete record, the appellant explained that despite relentless attendance to the offices of the transcription service providers in an attempt to obtain the missing part of the record, the transcribers were unwilling to assist satisfactorily therewith, as a result a complete record was filed about one and a half years late.

The missing parts of the record surfaced miraculously after a letter from the registrar of this court addressed to appellant's legal representatives was presented to the transcription service provider.

No explanation was provided why the recordings were not discovered earlier, if the recordings had always been on the trial court's storage devices. An explanation was called for in the circumstances of this case by the transcription service providers in the form of a supporting affidavit.

The non-compliance with the rules was glaring, inexplicable, not rational and unpersuasive. This court on the strength of the explanation for failure to file a complete record was left unanswered, which circumstances makes this court unable to understand how it really came about and to assess appellant's conduct and motives.

The deponent to appellant's founding affidavits in respect of his involvement in the trial proceedings or otherwise, contradicted himself, was not frank with this court, which in turn negatively affected the *bona fides* of the application.

It is incumbent upon an applicant in a condonation application, where it appears that part of the record is missing, to reconstruct the missing part or at least attempt to do so, where it is possible, in order to comply with his or her obligation to file a complete appeal record.

No issue of public importance arose which could have tilted the balance in favour of granting condonation. In the circumstances it is not necessary to consider the prospects of success on the merits.

Condonation and reinstatement application refused.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and SMUTS JA concurring):

[1] This is an appeal against the entire judgment delivered in the High Court (*a quo*) ordering the appellant to make certain payments (of N\$75 000 and N\$5000 respectively with interest) in respect of a claim for damages based on alleged misrepresentation, alternatively unjust enrichment, to the respondent, and by dismissing the appellant's counterclaim based on the repudiation of the contract in the amount of N\$240 886,62.

Background

[2] The respondent in the proceedings in the court *a quo* alleged in its amended particulars of claim that during August 2010 he was desirous of purchasing a 5 kw wind turbine and batteries with an inverter (the equipment) from the appellant provided that the equipment would be sold under guarantee against wind and lightning damage, which guarantee would be provided in writing.

[3] The respondent alleged that the appellant during August 2010 presented him with a quotation¹ for the equipment and with the intention of inducing the respondent to purchase the equipment, represented to him that the equipment would indeed be sold with a written guarantee against wind and lightning damage.

[4] The respondent alleged that relying on the truth of the aforesaid representation, he accepted the quotation, which constituted a partly written and partly oral agreement between the parties, and that he during September 2010 deposited an amount of N\$75 000 as partial payment in terms of the quotation.

¹ Annexure A to the particulars of claim.

[5] The respondent further alleges that during January 2011 he discovered that the aforesaid representation was false, in that the equipment could not be sold with aforesaid written guarantee. As a result of this misrepresentation, respondent cancelled the agreement and alleges he is therefore entitled to 'restitution' in the amount of N\$75 000.

[6] The respondent also alleged that he expended an amount of N\$5000 for purposes of constructing a foundation for the equipment, which as a result of the aforesaid misrepresentation and subsequent cancellation, respondent claimed costs which were within the contemplation of the parties.

[7] In three alternative claims the respondent alleged firstly, that the appellant was negligent in that appellant did not make proper enquiries from the manufacturer of the equipment as to the guarantees offered upon the sale of the equipment; secondly, that as a result of fraudulent misrepresentation by the appellant, respondent is entitled to claim the amount of N\$75 000; and thirdly, on the basis of unjust enrichment at the expense of respondent, he was entitled to claim the aforesaid amount.

[8] The appellant in its plea denied that the equipment would be sold under guarantee against wind and lightning damage and/or that any guarantee written or otherwise would be provided to the respondent in respect of the equipment.

[9] The appellant averred that during August 2010 it presented the respondent with a quotation, but denied that this was done with the intention of inducing the respondent to buy the equipment, and denied that any representation of whatever nature was made that the equipment would be sold with a written guarantee against wind and lightning damage.

[10] The appellant further pleaded that the respondent was in essence alleging and relying on what can only be an agreement to agree, which agreements are *contra bonos mores* and not enforceable.

[11] The appellant instituted a counterclaim in which it confirmed the agreement entered into as reflected in Annexure 'A' during August 2010. In terms of this agreement it was alleged that the purchase price of the equipment was N\$353 961,09 and the respondent would be obliged to pay 50 per cent of the purchase price upon ordering the equipment and the remaining 50 per cent upon delivery of the equipment in Windhoek. Furthermore that the quoted purchase price did not include transportation and installation costs of the equipment which were not specifically detailed in paragraph 3 of Annexure 'A'.

[12] It was alleged that during October 2010 to February 2011 the parties agreed to vary the terms of the agreement as follows:

- (a) the respondent would no longer purchase the equipment as detailed in Annexure 'A', but instead would purchase equipment detailed in

paragraphs 1, 2 and 3 (inclusive of sub-paragraphs) of the attached Annexure 'SOL 1'.

- (b) the purchase price would be N\$257 882,84 excluding transportation and installation costs apart from those items specifically detailed in paragraph 3 of 'SOL 1'.

- (c) the respondent agreed to pay 25 per cent of the purchase price upon order of the equipment; a further 25 per cent would be paid prior to shipping the equipment; 25 per cent upon delivery of the equipment; and the remaining 25 per cent was due and payable on commissioning of the equipment.

[13] It was alleged that the respondent requested that the equipment was to be delivered as a matter of urgency and that it was to be dispatched to Windhoek per air freight despite this freight being more expensive than shipping.

[14] It was alleged that the appellant took all the necessary steps to prepare the respondent's site for the installation of the equipment.

[15] It was alleged that the appellant sourced, ordered and paid for the delivery to Windhoek (per air freight) on 15 January 2017 as agreed.

[16] It was alleged that save for paying N\$75 000 the respondent failed to comply with all of his material obligations in terms of the agreements, and he thus has

breached material terms of the agreement and despite notice has failed to remedy the breach.

[17] It was alleged that, in any event, the respondent repudiated the agreement, which repudiation the appellant accepted and as a result of such repudiation appellant had suffered certain damages totalling N\$240 886,62.

[18] The respondent in his plea to appellant's counterclaim alleged that 'part and parcel' of Annexure 'A' was an oral undertaking that the wind turbine will have a warrantee/guarantee against wind and lightning damage, which oral undertaking was to manifest itself in writing.

[19] The respondent denied that the agreement (Annexure 'A') was ever varied as alleged and denied that the terms and conditions of the agreement as originally orally and/or agreed to in writing had ever been varied as alleged or at all.

[20] It was specifically denied by the respondent that the parties entered into a new agreement as alleged and also denied that 'SOL 1' found application and not Annexure 'A' any longer.

The condonation application

[21] Rule 8 of the Rules of this Court obliges a litigant to file, after an appeal had been noted, copies of the record of the proceedings with the registrar (in the circumstances of this case), within three months of the date of judgment or order

appealed against. The appellant failed to file a complete record and applied for condonation of the non-compliance with the rule, and further applied for leave to supplement the record of appeal with volumes 6, 6B, 7 and 8 as filed with the registrar of this court on Monday, 22 February 2021. The appellant also sought the reinstatement of the appeal and a costs order if the application is opposed. The application was opposed by the respondent.

[22] The judgment of the court *a quo* was delivered on 29 July 2019. The appellant noted an appeal against the judgment on 28 August 2019. The appeal record was due on 29 October 2019. The record of appeal was filed on 28 October 2019, however, without that part of the record reflecting the transcript of proceedings for the trial dates 26 April 2018, 24 May 2018 and 11 June 2018.

[23] The legal practitioner who deposed to the founding affidavit in support of the condonation application, explained that he was a candidate legal practitioner at that stage, was not privy to the trial proceedings and had no knowledge which portions of the record their offices possessed nor was he certain of the number of days and on which dates the court *a quo* sat for trial. This, he stated made it more difficult to identify which portions of the record were missing and to act swiftly. He stated that by the time he started preparing the appeal record, the court proceedings on some trial dates had already been transcribed as the parties had requested on previous occasions certain portions of the record for purposes of scrutinising the evidence in preparation of heads of argument in the court *a quo*.

[24] The deponent to the founding affidavit stated that pursuant to noting the appeal and consulting the respondent's legal practitioners on the content of the record, he started collecting the necessary documentation in order to compile a complete prepared appeal record. He stated that he familiarised himself with the available portions of the record and quickly identified that the record for **24 May 2018** and **11 June 2018**² were still outstanding.

[25] He explained that applicant had *ex abundanti cautela* started preparing the appeal record in early August 2018 and on 1 August 2018 he, for the first time attended the offices of the transcribers (Tunga) in order to request the missing portions of the record and found that the transcriber's offices had been vacated. He was informed that Tunga had been replaced by another transcription service provider (Hibachi). He was also informed that a number of the staff employed by Tunga were then re-employed by Hibachi. He was assured by the staff of Tunga that all data would be kept safe and stored for the new transcribing service provider to take over.

[26] He explained that on 16 August 2018 he returned to Hibachi and requested the transcription of the entire record as he was still unsure whether there were any other dates of the record outstanding. On 24 October 2018 Hibachi informed him that the entire record was available for inspection. This was conveyed to him on Wednesday preceding the Monday on which the appeal record was due. He discovered that the record was still incomplete since the supposed complete record was no different from the incomplete record in his possession. The proceedings of the dates 24 May 2018

² The dates as they appear in the founding affidavit (in bold).

and 11 June 2018 had not been included. He explained that he requested Hibachi to revisit the Prison Court as well as Court E, since these were the courts in which the trial was held, in the hope that the outstanding portions of the record may still be on those recording devices.

[27] He related that subsequently he unsuccessfully engaged the respondent's legal practitioner in an effort to agree to an extension of time within which to file the appeal record.

[28] He explained the options available to him at that stage was firstly, not to file the appeal record at all, in the hope that Hibachi would eventually find the missing record and then deal with the consequences of filing the record late or secondly, file the incomplete record. He decided on the second option fearful that the appellant may suffer the 'harsh' consequences of not having filed an appeal record on time.

[29] He stated that prior to the filing of the record he had on numerous occasions attended to the offices of the transcribers begging them for the complete record. On 5 November 2018 subsequent to the filing of the incomplete record, he again attended to their offices and submitted a new requisition sheet. He stated that afterwards on a weekly basis, he telephonically as well as in person attended to the offices of the transcribers but was on each occasion informed that they were still searching for the missing parts of the record. At this point he assumed that the outstanding record did not exist at all.

[30] According to the deponent, the weeks became months and the year 2018 became 2019 with no missing record forthcoming from the transcribers, and he assumed there were no recordings for the dates 24 May 2018 and 11 June 2018. Since he could do nothing more, he decided to stop attending to the offices of the transcribers.

[31] The issue resurfaced upon receipt of a letter from the registrar of this court, dated 2 February 2021, addressing the fact that, that part of the record is clearly missing. The deponent explained that he immediately took that letter to the transcribers to impose on them the seriousness of the issue and the urgency in which the missing part of the record was required.

[32] Miraculously, two days later, the recording of the proceedings of 11 June 2018, was found. The recording was always on the trial court's storage device. He commenced the preparation of the supplementary appeal record which was filed on 22 February 2021. However, the proceedings of 24 May 2018 were still outstanding. He explained that after having maintained pressure on Hibachi throughout the week of 22 to 26 February 2021 he was informed by Onesmus Nampala from Hibachi's office via WhatsApp that this portion of the record had been found at Prison Court.

[33] The deponent pointed out that the filing of the incomplete appeal record was not as a result of any disregard of the Rules of this Court, nor any lethargic or passive approach by the appellant. He pointed out further that an application to this court for an extension of time before the filing of the incomplete record may have been more

correct and prudent approach, however, at that time he was under the impression that the missing portions of the record did not exist and that such an application would be pointless.

[34] The deponent pointed out that it seemed that for the last two and a half years, the various dates on which the trial court sat were all recorded and as such could have been transcribed. However, according to the deponent, despite relentless attendance, inquiries and demands from the appellant's side, Tunga and/or Hibachi were unwilling to assist satisfactorily therewith as no record was forthcoming from Hibachi for one and a half years.

[35] The deponent argued that the appellant has good prospects of success on appeal, and in the light of the efforts employed to file a complete record, the appellant should not be prejudiced as a result of a third party's inability to deliver upon whom it entirely depended. The deponent dealt extensively with the prospects of success on appeal in his founding affidavit. I shall return to this aspect later during this judgment.

[36] The discovery of the records of the proceedings for 24 May 2018 and 11 June 2018 was however not the end of the dilemma faced by the appellant as will appear from what follows hereunder.

[37] The hearing of this appeal, as well as the condonation application, was set down on 31 March 2021. On this day the parties were informed by this court that part of the record of the proceedings³ was still missing, rendering the appeal record

³ The transcription of the proceedings of 26 April 2018.

incomplete. On this day, the matter was removed from the roll, with costs to be borne by the appellant.

[38] In a second affidavit in support of the condonation application the same deponent explained that from 31 March 2021 until 23 April 2021 the appellant consulted client to explain what transpired at the appeal hearing, consulted counsel and considered the best way forward to properly pursue the appeal, and drafted the second affidavit in support of the condonation application on 23 to 26 April 2021. The deponent explained that the last missing portion of the record was in the process of being transcribed on 26 April 2021 and expected to be filed on 27 April 2021. It is not clear from the affidavit when, where and by whom the last missing portion of the record was discovered.

[39] The respondent deposed to an answering affidavit opposing the condonation application. The respondent in his answering affidavit, deposed to on 9 March 2021, stated that as a consequence of appellant's prosecution of its appeal out of step with rule 8(1)(b) of the Rules of this Court, the appeal has lapsed. Furthermore, in the notice of motion, the appellant did not seek reinstatement of the appeal.

[40] The respondent, without specifically addressing each and every paragraph of appellant's founding affidavit, contended that the explanation proffered by the appellant is neither reasonable nor acceptable; that the entire period of the appellant's non-compliance with the rules, is explained in bald, vague, sketchy and contradictory terms; that there were various periods of inactivity which were completely unexplained; that it is both telling and inappropriate that the candidate

legal practitioner's principal did not depose to any affidavit to explain his or her supervision of the candidate legal practitioner; that appellant's non-compliance persisted into the period within which the parties to the appeal were to deliver written submissions; and that the prejudice that his legal representatives of record, who were not involved in the proceedings in the court *a quo*, suffered in the preparation of this appeal, is almost palpable.

[41] The respondent implored this court, not to proceed to the second leg of the enquiry, and to reject the explanation proffered by the appellant for the non-compliance with the Rules of this Court.

[42] The respondent stated that if the version of appellant's deponent were to be accepted, then the appellant was already before the filing of the purported record of appeal on 28 October 2019 aware that the record was incomplete, therefore the time to apply for condonation started to run at the very least, on 28 October 2019.

[43] It was argued that one of the principles of condonation is that condonation must be sought as soon as it becomes evident that condonation is required, ie 28 October 2019 at the very latest, but the first attempt at seeking condonation was launched on 1 March 2021, roughly one and a half years later.

[44] The respondent explained that on 31 March 2021 the matter was removed from the roll by the appellant after this court asked the appellant if it was sure it wanted to proceed with the matter despite part of the record having been filed during

the term while this court was sitting. The present application was thereafter launched on 27 April 2021 without an explanation as to why it took another month for the present application to be instituted.

[45] The respondent was of the view that in essence the excuse proffered by the deponent to appellant's affidavit, in support of the condonation application, did not know how he should have proceeded in terms of the Rules of this Court.

[46] Nevertheless, the respondent in respect of prospects of success on appeal, stated that it does not lie in the mouth of the deponent to appellant's founding affidavit to plead the matter pertaining to the presence (or otherwise) of prospects of success, since he is, not having been a party to the proceedings in the court *a quo*, incompetent to do so and that on this basis alone, this court should be disinclined to deal with this aspect.

[47] The respondent pointed out that there was a duly admitted legal practitioner with a right of audience to appear before this court, supervising the deponent, but there is no full and detailed explanation by the duly admitted legal practitioner who was responsible for the prosecution of this matter which serves before this court for consideration.

[48] The respondent further stated that when candidate legal practitioners undertake their attachment, ethically they are not and cannot be responsible for the running of a case; that the present facts point to gross negligence in the prosecution of the appeal; that the appellant should have been consulting with an admitted legal

practitioner for purposes of prosecuting the appeal, which does not seem to have been the case in the present instance.

[49] In a second answering affidavit dated 17 May 2021 each and every paragraph of appellant's founding affidavit was addressed. In this second answering affidavit the respondent stated that it relies on three grounds in opposing the condonation application. Firstly, the ground mentioned in the first answering affidavit in respect of the allegation that the candidate legal practitioner's supervisor did not depose to a supporting affidavit (not merely a confirmatory affidavit) expressly indicating the steps which he took in ensuring that the appeal was properly lodged and prosecuted. Secondly, the explanation advanced by appellant's legal representatives is essentially a lack of knowledge as to the applicable rules and practice of this court, and thirdly, an admitted delay in launching this application which runs from the date when the incomplete record was filed on 28 October 2019 up until 1 March 2021 when a belated application for condonation was filed. The respondent further advised that the appellant should have engaged the legal practitioners of the respondent requesting for a meeting to reconstruct the missing portions of the record as a first step which step was never taken.

[50] The respondent stated that the founding affidavit lacks specific details in that no dates were provided when the follow ups with Hibachi took place, who was spoken to and on which dates follow-ups took place. The last date of attendance provided is 5 November 2018. In addition, the respondent noted the absence of an affidavit from

Hibachi confirming the allegations made by the deponent of the appellant's founding affidavit.

[51] The respondent averred that the disregard of the rules is of such a nature that this court should not even consider the prospects of success.

[52] The respondent expressed the view that the appellant has no prospects of success on appeal. It was pointed out that the court *a quo* did not commit any error in law by permitting the respondent to amend his witness statement to incorporate the matter pertaining to respondent's engagement with Lange⁴ since this did not alter the issues arising for determination as set out in the parties' proposed pre-trial order, and that the appellant could consequentially have dealt with any supplementation by seeking to call Lange if it so wished, but elected not to do so.

[53] The respondent further emphasised that in the various electronic mail exchanges between himself and the appellant, he had sought a record of the initially verbally agreed terms.

[54] The appellant's legal practitioner also deposed to two replying affidavits. In his first replying affidavit (dated 19 March 2021) appellant's legal practitioner pointed out that although he was a candidate legal practitioner for the duration of the trial in the court *a quo*, by the time he filed the incomplete appeal record he was a duly admitted legal practitioner.

⁴ A witness called on behalf of the appellant.

[55] In regard to the respondent's contention that appellant's non-compliance is so palpable, appellant's legal practitioner averred that the non-compliance complained of resulted solely from a third party's inability to deliver the transcription. It was pointed out that appellant had requested the entire record of the proceedings as early as 17 July 2018 by Mark Kutzner, (Kutzner) in preparation of heads of argument, in the court *a quo*, and once Tunga Transcription Services had been paid he was instructed by Kutzner to start preparing the appeal record, and subsequently identified the missing portions.

[56] It was stated that there was no abandonment of the duty to timeously commence with the preparation of the appeal record and that he reported to Kutzner who maintained a sense of urgency and an oversight on the preparation of the record.

[57] The deponent stated that he had attended several sessions in the court *a quo* and was present during Lühl's evidence-in-chief, and during Joring von Gossler's cross-examination and that he has a well-informed comprehension of the evidence and the issues in this case. He disputed that him deposing to the prospects of success is an issue and mentioned that appellant's director deposed to a confirmatory affidavit.

[58] In the second replying affidavit, dated 27 May 2021, appellant's legal practitioner replied to the three grounds of opposition raised by the respondent in his

second answering affidavit. This was basically a reference to what was stated in his founding and first replying affidavits.

[59] The deponent pointed out that the appellant could not have sought condonation for the late filing of the appeal record before it had supplemented the outstanding portions of the record, alternatively, whether an application for condonation and reinstatement could have been filed at the time of filing the incomplete record (on 28 October 2019), whilst the outstanding portions of the appeal record had not been forthcoming from Hibachi until he could present to them a letter from the registrar of this court stating that portions of the record were missing.

[60] The deponent further stated that due to Hibachi's constant undertaking to him (as late as 2021) that the record of 26 April 2018 was not available, nor found in their archive, nor at the court *a quo*, he did not think it wise to undertake (in his previous condonation affidavit) that the appellant would supplement the record with that portion.

The approach in respect of condonation applications

[61] In this appeal although the appellant has filed the record of the proceedings in the court *a quo* within the three month period after judgment as prescribed by rule 8(2) (b), the record was incomplete. This court could not adjudicate the appeal in this matter on an incomplete record. Thus where the appeal record has not been filed within the time periods provided in the rules or where the appeal record is incomplete,

the defaulting litigant must bring an application seeking the condonation for the non-compliance with the Rules of this Court.

[62] It is trite law that once there has been non-compliance, an applicant should without delay apply for condonation and comply with the rules.

[63] In *Beukes & another v South West Africa Building Society (SWABOU) & others*⁵ this court explained:

[13] In seeking condonation, the applicants have to make out their case on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it’

[64] In *Balzer v Vries*⁶ the approach was explained as follows:

[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.’

[65] There are a number of factors relevant in determining whether or not an application for condonation for the non-compliance with the rules should succeed.

These were summarised in *Arangies t/a Auto Tech v Quick Build*⁷ as follows:

⁵ *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC (5 November 2010) para 13.

⁶ *Balzer v Vries* 2015 (2) NR 547 (SC).

⁷ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5.

[5] The application for condonation must thus be lodged without delay, and must provide a “full, detailed and accurate” explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent’s (and where applicable, the public’s) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

These factors are not individually determinative, but must be weighed, one against the other. Nor will all factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been “glaring”, “flagrant”, and “inexplicable”.

[66] In the matter of *Thembela Madinda v Minister of Security of the Republic of South Africa*⁸ at para 10 the court referred to possible relevant factors in determining ‘good cause’ and included, amongst others, ‘. . . any contribution by other persons or parties to the delay and the applicant’s responsibility therefor’.

[67] In my view, whether a third party or parties, in this instance Tunga and/or Hibachi, contributed to the delay or not, is an important consideration since it is the appellant’s case that a third party was solely to blame for the delay in filing the missing parts of the appeal record.

⁸ *Thembela Madinda v Minister of Security of the Republic of South Africa* (153/2007) [2008] ZASCA 34 (28 March 2008).

[68] In the determination of what constitutes 'good cause', the court would consider the facts and circumstances of each particular application in the exercise of its judicial discretion.

Submissions by counsel

On behalf of the applicant

[69] The appellant's legal representative referred to the explanation given by the deponent to the founding affidavit in support of the condonation application and submitted that in the circumstances the deponent was not remiss or reckless and was clearly aware of the rules.

[70] It was submitted that the appellant's application for condonation was brought more than two years after the non-compliance occurred, and that the appellant should have appreciated that the filing of the incomplete appeal record was not proper compliance with rule 8, and should there and then have applied for an extension of time.

[71] Counsel however pointed out that a condonation application at the time of the non-compliance would not have cured the defect, and, consequently, it would ultimately not have been possible to seek the reinstatement of the appeal even if condonation was granted. This was so, it was submitted, because the appellant was at that stage not in possession of the missing portions, and on the authority of *Tweya*

v Herbert,⁹ the non-compliance of filing an incomplete record remains a bar to the appellant, until a complete appeal record has been filed, and only then can the appeal be reinstated.

[72] In response to questions by this court, counsel stated that it was never a consideration to reconstruct the record, neither could counsel explain why this court was not informed of the incomplete record at the time the record was filed.

[73] It was submitted that although this was not a case of huge public interest, the public would nonetheless not want a case where it was blatantly incorrectly decided to stand. Counsel submitted in this regard that there were serious misdirections by the court *a quo*.

[74] Counsel in the heads of argument submitted ‘that the non-compliance although glaring was not flagrant nor was it – in the circumstances – inexplicable’. It was submitted that a reasonable explanation was proffered and as such the appellant’s prospects of success cannot simply be ignored.

[75] Counsel submitted that the appellant was held hostage by a third party, and referred to the case of *Imalwa v Gaweseb*¹⁰ where this court held that an applicant could not be held responsible for the lapsing of its appeal, if the non-compliance, which led to the lapsing, was ‘as a result of a third party’s inability to deliver’.

⁹ *Tweya v Herbert* (SA 76/2014) [2016] NASC (6 July 2016).

¹⁰ *Imalwa v Gaweseb* (SA 61/2018) [2021] NASC (1 March 2021) para 81-82.

[76] It was submitted that the appellant's founding affidavit demonstrated that the appellant (albeit through its legal practitioners) could not have done more than what they did to prevent the appeal from lapsing.

On behalf of the respondent

[77] The legal practitioner of the respondent in argument referred to certain portions of the appellant's founding affidavit¹¹ where the deponent stated that he suspected that the outstanding portions of the record did not exist and that it would be pointless to wait for it any longer. To this explanation it was pointed out that in the court *a quo* the appellant was represented by an instructing and an instructed legal practitioner and that there was no explanation why it was thought at the time that no more portions of the record existed.

[78] In respect of the appellant's deponent's admission that the applicant erred in its approach to this court, namely that the appellant filed an incomplete appeal record without notice to this court, nor was there an application for an extension of the time period for the filing of the appeal record, it was submitted that there was no explanation why this was not done. It was further submitted that this was an admitted disregard of the Rules of this Court.

[79] In respect of the paragraph in appellant's founding affidavit that the deponent was at that stage still a candidate legal practitioner who may not have appreciated this court's understanding of such unfortunate circumstances¹² and its inclination to allow an extension of time within which to file the appeal record, it begs the question,

¹¹ Paras 28 and 29.

¹² ie where a third party was allegedly solely to blame for the filing of an incomplete record.

so it was submitted, where was the principal of this candidate legal practitioner during the time this assignment was allocated to him. It was submitted that no one said anything pertaining to the aspect of supervision of the candidate legal practitioner.

[80] It was submitted that the appellant's application for condonation and reinstatement failed to demonstrate good cause in that:

- (a) it is premised on the ignorance of the practice and Rules of this Court,
and
- (b) no explanation is proffered by the appellant's instructing legal practitioner in the court *a quo* (or the candidate legal practitioner's principal) on the matter attendant to the delay timeously delivering the record or seeking an extension of the delivery thereof.

Consideration of explanation

[81] The legal representative of the appellant in his heads of argument expressed the view that although the non-compliance was 'glaring', it was not flagrant in the circumstances, neither was it inexplicable. I need to mention upfront, that although counsel held such a view, it is for this court in the final analysis to consider whether or not such a view is justified and whether a reasonable and satisfactory explanation was advanced for non-compliance with the rules.

[82] The appellant relies on the authority of *Imalwa v Gaweseb* for the contention that it was blameless in respect of the non-compliance with the rules, since such non-compliance was solely as a result of a third party's inability to deliver. As was stated hereinbefore each application is to be considered on its own peculiar facts and circumstances.

[83] *Imalwa v Gaweseb* in my view is distinguishable on the facts. In this matter the appellant deemed it necessary for the determination of the appeal to include legal submissions in the court *a quo*, a reason which the appeal court accepted as a deviation from the requirements of what should not be included in the appeal record. This was necessary to be transcribed in the circumstances.

[84] Secondly, the appeal record was filed about five weeks late. The court of appeal took into account the unfortunate circumstances that a one month recess fell within the three month time line. If that period is taken into account the record was filed about two weeks out of time. The appellant's legal representative on numerous occasions followed up with the transcriber's promise that the transcription would take only a few days to be finalised. The transcribed record however was provided much later. It was in these circumstances which this court found that the delay in filing the record cannot be apportioned to the appellants or their legal representatives as it was as a result of a third party's inability to deliver the transcribed record timeously. The facts of the present matter differed markedly in respect of the time it took to file a complete transcribed record, ie one and a half years late, although the appellant's legal practitioner makes a similar allegation that the late filing of the incomplete record

was attributed to the inability of the transcription services to provide the transcribed record. As indicated this aspect will require, in the circumstances of this case further scrutiny.

[85] In support of the submission that appellant's legal representative attended to the offices of the transcription service providers regularly, it was stated in the first founding affidavit (filed on 21 March 2021), that on 5 November 2018 a new requisition sheet was completed and attached as an annexure. No annexure to this affidavit was attached. In the second founding affidavit (filed on 30 April 2021) this statement was repeated and an annexure was attached together with a copy of an email addressed to the transcribers. This requisition sheet however reveals that the date the services were requested was 5 November 2019 and not 5 November 2018 (a year later than stated in the two founding affidavits). It does not appear from these founding affidavits that a requisition form was also completed on 5 November 2018 or why the requisition form completed on 5 November 2018 had not been attached. The email also bears the date of 5 November 2019. The judgment itself was delivered on 29 July 2019 and it may be possible that the appellant's legal representative meant to refer to 2019 instead of 2018 which is consistently referred to in both of his founding affidavits. This is yet a further unsatisfactory aspect in what emerges as a contrived and implausible explanation, given the other unsatisfactory features of the explanation as explained hereunder.

[86] The deponent to appellant's first founding affidavit pointed out that he was not privy to the court proceedings in the court *a quo*, and therefore had no knowledge of which portions of the record their offices possessed, nor was he certain about the

number of days, and on which dates the court *a quo* sat. The deponent stated that this made it undoubtedly more difficult to identify which portions of the record were still missing and to act swiftly.

[87] In the second founding affidavit, and in response to the respondent's submission¹³ that it does not lie in the mouth of the deponent to appellant's founding affidavit to plead matter pertaining to the presence, or otherwise, of prospects of success since him not having been a party to the proceedings in the court *a quo*, is incompetent to do so, the deponent to appellant's founding affidavit, responded that he had attended several sessions in the court *a quo*, and has a well-informed comprehension of the evidence and issues of this case.

[88] There is a contradiction between the first founding statement of the deponent to appellant's condonation application that he was not privy to the proceedings in the court *a quo* and the second founding statement that he had attended several sessions in the court *a quo*. An applicant in a condonation application needs to be candid in his or her application for condonation. In my view, the deponent to the founding affidavits was not frank with this court in respect of the extent of his involvement in the trial proceedings in the court *a quo*. This in turn must have a negative impact on the *bona fides* of the application. The deponent in addition did not take this court into his confidence when the appeal record was filed to inform this court that the record was incomplete.

¹³ In the answering affidavit of the respondent.

[89] The deponent to the founding affidavits' explanation for the delay in filing a complete record is that a third party was for a period of one and a half years unwilling to assist satisfactorily with the provision of the missing parts of the record.

[90] This in my view is a serious allegation. There is no supporting affidavit from the transcription service providers to confirm this state of affairs and neither is there any explanation why there is no supporting affidavit in this regard.

[91] After a period of one and a half years of inactivity, the missing portions of the record, which were thought not to exist, miraculously surfaced. The magic wand was the letter from the registrar dated 2 February 2021. It has been stated by this court that an explanation for the non-compliance with the Rules of this Court, must be full, detailed and accurate in order to enable this court to understand clearly the reason(s) for such non-compliance. In my view, although a miracle can be described as an occurrence which defies a rational explanation, in a condonation application a reasonable and acceptable explanation for the delay is a requirement.

[92] In order for this court to understand the reason for the delay, it was necessary in my view, given the circumstances of this case, to have obtained a supporting affidavit from at least one employee of the transcription service providers who has first-hand experience of the relevant circumstances. The deponent to the founding affidavit in support of the condonation application cannot explain this in view of his explanation that he did not have access to the recording devices used to record the proceedings in the court *a quo*. The explanation by the deponent to the founding

affidavits in support of the application, on its own, is in my view unsatisfactory to explain the surfacing of missing parts of the record after such a long delay, and especially in view of the serious allegation levelled against the transcription service providers.

[93] This court would have expected an explanation, if the proceedings were all along on the recording devices, why they were not discovered much earlier. There is for example no explanation in respect of the proceedings of 26 April 2018 as to where the recordings were discovered, by whom they were discovered, when they were discovered and why they were discovered so late. In respect of all the missing portions of the record (ie for 26 April 2018, 24 May 2018 and 11 June 2018) there is no explanation why they were discovered only after the letter from the registrar was presented.

[94] In the matter of *MA v AG* an unreported decision of this court,¹⁴ the explanation tendered on behalf of the applicant in a condonation application, was that the practitioner was under the ‘impression’ that the record had to be filed three months from the notice of appeal. This court remarked that the practitioner did not take this court into her confidence as to quite how she laboured under such ‘impression’. This court expressed the view (at para 19) that:

‘In the absence of the “impression” being explained at all (and where an explanation is certainly called for), it is nothing more than a self-serving statement set up to suit the

¹⁴ *MA v AG* (SA 72/2019) [2021] NASC (10 March 2021).

timing of her eventual filing of the record, without any plausible basis and thus lacking in credibility’

[95] Similarly, in the present matter, in my view, an explanation was called for why the missing portions of the record were discovered only after the letter from the registrar was presented to the transcription service providers.

[96] The impression created by the deponent to the founding affidavits is that his hands were tied (figuratively speaking) and that he could do no more. This is a view which should not be encouraged. It remains the responsibility of an applicant in a condonation application to provide a complete as possible record of the proceedings in the court *a quo*. Depending on the extent of the missing record, one would have expected appellant to reconstruct the lost part of the record or at least have attempted to do so. If it was not possible to do so, eg due to the voluminousness of the lost part of the record, to at least explain that an attempt had been made at reconstruction and why it was not feasible, to start, or to complete the reconstruction. We know that there was not even a consideration of attempting to reconstruct the missing part of the record and that there is no explanation why this was not done – not from the deponent to the founding affidavits, neither from his principal nor from appellant’s instructing legal practitioner in the court *a quo*.

[97] The reconstruction of a missing part of a record is not a novel idea. In *Arangies* this court *inter alia* remarked that it appeared (in the circumstances of that case) that appellant’s legal representative made very little effort to locate the missing file ‘*or to take steps to collate a substituted record*’.¹⁵

¹⁵ Paragraph 8. Emphasis provided.

[98] The public importance of the issues, raised for determination by a court, is a factor taken into account in the consideration whether or not to exercise its discretion in a condonation application in favour of an applicant.

[99] In *Road Fund Administration v Skorpion Mining Company (Pty) Ltd*¹⁶ it took the instructing counsel nine months after being advised by the registrar that the appeal was deemed withdrawn, to bring an application for condonation and reinstatement of the appeal. This court held that¹⁷ had it not been for the great public importance of the issues raised and the overwhelming prospects of success, that case would have been a proper case to strike the appeal without considering the prospects of success in view of the unacceptable conduct of the appellant's instructing counsel.

[100] Similarly in *MA v AG (supra)*, the appellant failed to provide an acceptable or satisfactory explanation for the non-compliance with the Rules of this Court. It was held that ordinarily, the application for condonation would fall to be dismissed for this reason alone, without the need to consider the prospects of success of the appeal. This court however held that because of the public importance of the case, the court needed to consider the merits of the case.

[101] In the present application, no issue of public importance arises which could 'tilt the balance in favour of condonation . . .',¹⁸ requiring the consideration of prospects of success in the appeal.

¹⁶ *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC).

¹⁷ Para 3.

¹⁸ *Skorpion Mining (supra)* para 3.

[102] As stated hereinbefore, where there was non-compliance with the Rules of this Court, an applicant should lodge without delay an application for condonation and explain the delay and the failure to comply with the rules. In this regard it was admitted on behalf of the appellant that the application for condonation was brought more than one and a half years after the non-compliance and that the appellant should have appreciated that the filing of the record, incomplete, was not proper compliance with rule 8. Counsel however sought to justify this failure by pointing out that a condonation application would not have cured the defect, and that it would not have been possible to seek reinstatement, even if condonation was granted.

[103] This is, in my view, an unacceptable unilateral justification for its failure to lodge the condonation application without delay. It is for this court to consider any condonation application and not for the appellant to second-guess the possible outcome of the condonation application and application for reinstatement of the appeal.

[104] In my view, the reason why the appellant found itself in such a precarious situation was because the person tasked with preparing the record did not properly peruse it and had no proper supervision and guidance. Had he properly perused the record he would have discovered that the record was incomplete. This finding is bolstered by the fact that counsel who appeared on behalf of the appellant was ready to address this court on 31 March 2021 on the condonation application and reinstatement of the appeal, when it was pointed out by this court that the record was

incomplete – the transcription in respect of the proceedings of 26 April 2018 was missing. It is further bolstered by the statement of the deponent of appellant's first founding affidavit himself in support of the condonation application, where he stated that he identified that the record for the proceedings in the court *a quo* for 24 May 2018 and 11 June 2018 were still outstanding – this after he had familiarised himself with the available portions of the record. No word was mentioned of the missing portion of the proceedings in respect of 26 April 2018.

[105] I agree with the submission by counsel for the appellant that the non-compliance was glaring, but disagree that it was not inexplicable.

[106] The reason provided by the deponent to the appellant's founding affidavit that the missing part of the record miraculously appeared after he had presented the letter from the registrar is not persuasive. As indicated hereinbefore it leaves a number of questions unanswered and this court is in the circumstances unable to understand why the missing parts of the record were filed late.

[107] The deponent to the founding affidavits filed on behalf of the appellant averred that appellant never abandoned the appeal, but one is left wondering what would have happened in respect of the prosecution of the appeal, had the registrar not addressed the letter to appellant's legal practitioners.

[108] In view of the fact that the reason provided for the non-compliance with the rules is glaring, inexplicable and unacceptable this court is of the view that the

condonation application should fail without the necessity of considering the prospects of success in respect of the merits of the appeal in spite of the fact that prospects of success in respect of the merits is good. The deponent to the founding affidavits also was not frank with this court in respect of his involvement in the trial in the court *a quo*.

[109] In the result the following order is made:

- (a) The application for condonation and reinstatement of the appeal is refused.
- (b) The matter is struck from the roll.
- (c) The applicant is ordered to pay the costs of the respondent, such costs to include the costs consequent upon the employment of one instructing and one instructed legal practitioner.

HOFF JA

MAINGA JA

SMUTS JA

APPEARANCES

APPELLANT:

J P Ravenscroft-Jones

Instructed by Engling, Stritter & Partners

RESPONDENT:

T Muhongo

Instructed by Koep & Partners