



NOT REPORTABLE

CASE NO: SA 95/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LIMITED

Appellant

and

SILAS HAFENI NEKWAYA

Respondent

Coram: SHIVUTE CJ, MAINGA JA and HOFF JA

Heard: 11 November 2022

Delivered: 1 December 2022

Summary: Condonation applications – there is some interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance of a rule of court and the reasonable prospects of success on appeal.

Good prospects of success on appeal may lead to a condonation and reinstatement application being granted in spite of the fact that the explanation for the non-compliance is weak or not entirely satisfactory, as in this instance.

A litigant may be allowed to raise a legal point for the first time on appeal in certain circumstances, for example, if there is no unfairness to the party against whom it is

directed. A court of appeal in those circumstances is bound to deal with it. It would create an intolerable position if a court of appeal is precluded from giving the right decision on accepted facts merely because one of the parties had failed to raise a legal point.

The appellant claimed from the respondent a certain amount of money based on the provisions of the Credit Agreements Act 75 of 1980. The respondent contended that there was non-compliance with a provision of the Credit Agreements Act, and successfully applied for absolution from the instance in the *court a quo* at the conclusion of the appellant's case.

Held, the legal point raised that at the time of the conclusion of the instalment sale transaction between the parties, the provisions of the Credit Agreements Act were not applicable to that agreement, succeeds and consequently the basis upon which the *court a quo* granted absolution from the instance falls away.

Held, the evidence presented by the appellant established a *prima facie* case of its claim which in turn requires a reply from the respondent.

Held, the application for condonation and the reinstatement of the appeal succeeds, the appeal is reinstated and upheld.

The matter is referred back to the *court a quo* for the continuation of the trial.

APPEAL JUDGMENT

HOFF JA (SHIVUTE CJ and MAINGA JA concurring):

[1] This is an appeal against an order of the High Court (*court a quo*) in which it granted absolution from the instance at the conclusion of appellant's case, in favour

of the respondent. The appellant was ordered to pay the costs of the respondent on an attorney-client scale.

Background

[2] The appellant issued summons against the respondent for the amount of N\$1 757 343,29 representing the outstanding amount due in terms of a vehicle instalment sale agreement. In the particulars of claim, it was stated that on 11 December 2015, the parties entered into a written Vehicle and Asset Finance Instalment Sale Agreement for a Maserati Ghibli 3.0 V6 S, a sports motor vehicle, for the price of N\$2 078 433,60 payable in 59 equal monthly instalments of N\$36 640,59 with the final instalment payable on 10 December 2020.

[3] In the particulars of claim, it was further stated that the agreement was governed by the provisions of the Credit Agreements Act 75 of 1980 (the Act); that the respondent was in breach of his obligations by failing to pay the monthly instalments on due date; that the outstanding amount due on 13 February 2017 was N\$1 757 343,29; and that notwithstanding notices dispatched by the appellant in terms of the provisions of s 11 of the Act calling upon the respondent to make payments for the shortfall within 30 days, the respondent remained in default for a period of more than 14 days.

[4] The respondent in his plea *inter alia* denied that the outstanding arrear amount was N\$1 757 343,29; pleaded that the notice referred to in the appellant's particulars of claim in terms of s 11 of the Act never reached him; that there was no hand

delivery of the said notice, nor had the appellant provided an acknowledgement of receipt of the notices referred to in the particulars of claim.

[5] The appellant unsuccessfully applied for summary judgment and the matter proceeded to trial. In a varied pre-trial order the only issue of fact for determination was whether the respondent had been notified by registered mail of the cancellation of the agreement in terms of s 11 of the Act.

Proceedings in the court *a quo*

[6] The appellant called one witness, Mr Nolan Christians (Christians), its Head of Department Rehabilitation and Recoveries. He testified that a notice was sent to the respondent via his registered postal address on 12 August 2016 demanding from the respondent the outstanding payments, and that subsequently on 14 February 2017 he notified the respondent, again via his registered postal address, that the appellant had cancelled the agreement with immediate effect.

[7] In cross-examination the legal practitioner of the respondent did not challenge the oral testimony of Christians. The challenge was limited to the fact that the s 11 notice (the actual document) was not tendered into evidence.

[8] In an *ex tempore* judgment, delivered on 30 July 2019, the court *a quo* stated:

'In the absence of those papers Counsel I would have to agree and grant absolution from the instance with costs on an attorney and client scale.'

On appeal

The condonation application

[9] The notice of appeal was filed on 4 November 2020 which necessitated the launching of a condonation application and an application for the reinstatement of the appeal. The appeal is unopposed.

[10] Nevertheless it is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the granting of condonation. Such an application must be launched as soon as a litigant becomes aware that there had been a failure to comply with a rule or rules. The affidavit accompanying the condonation application must set out a full, detailed and accurate explanation for the failure to comply with the rules and the court will also consider the litigant's prospects of success on the merits, save in those instances where non-compliance has been glaring, flagrant and inexplicable.

[11] Rule 7(1) of the Rules of this Court provides that a litigant must file his or her notice of appeal with the registrar within 21 days after the judgment or order appealed against has been pronounced. The appellant filed its notice of appeal about 15 months late.

[12] Undjii Kaihivi, the Manager: Legal Services of the appellant deposed to the founding affidavit in support of the condonation application.

[13] She stated that the reason why the notice of appeal was not filed within the time period set out in the rule was due to appellant's misunderstanding of the law. This misunderstanding was based on erroneous legal advice received by the appellant. On the strength of this legal advice, the appellant was under the mistaken belief that the order granting absolution from the instance in the circumstances was not final and therefore, not appealable.

[14] The deponent to the founding affidavit stated that the failure to file the notice of appeal timeously was not the appellant's doing at all, and that if the appellant had been advised that the order was final and appealable, instructions would have been given to lodge the appeal without any delay. The deponent referred to the supporting affidavit of the instructing legal practitioner where the delay was fully explained. It was contended that the explanation was reasonable, that appellant's conduct could not be described as a reckless disregard of the rules by the appellant itself, and that there are excellent prospects of success on appeal.

[15] The deponent to the founding affidavit further contended that appellant stands to suffer serious prejudice if it is not allowed to proceed with the appeal. She listed the following examples in order to demonstrate the prejudice the appellant would suffer:

- (a) the respondent's legal practitioner is not a senior legal practitioner yet he over-charges at N\$6000 per hour – by contrast most senior counsel in Namibia charge N\$4000 per hour;

- (b) the respondent's legal practitioner allegedly spent six hours on researching the Usury Act 63 of 1978 – bearing in mind the Usury Act is 42 years old and has only 19 sections, both the fee and time spent are unreasonable and inappropriate;
- (c) the respondent's legal practitioner charges his hourly fee for appearances at case management which were attended by more junior practitioners;
- (d) the respondent's legal practitioner tendered the costs of the first day of the trial being 29 July 2019. Despite that, work done allegedly for three hours and 40 minutes on 29 July 2019 are included in the bill of costs;
- (e) the respondent's legal practitioner charges a reservation fee of N\$240 000 which, as an instructing legal practitioner, he is simply not entitled to; and
- (f) the respondent's legal practitioner charges a reservation fee for 29 July 2019 in circumstances where those costs have been tendered and awarded to the appellant.

[16] The deponent to the founding affidavit viewed the bill of costs as glaringly excessive, entirely unrealistic, and completely unacceptable in circumstances where

the alleged costs of an astonishing N\$880 100 was in respect of a simple case which was finished on the first day of the trial.

[17] The instructing legal practitioner in a supporting affidavit stated that a junior legal practitioner represented the appellant during the trial proceedings. After absolution from the instance was granted by the court *a quo*, the junior legal practitioner informed her about the outcome, and she advised the junior legal practitioner to consult an advocate. At this stage, the written reasons by the court *a quo* were not yet available. The advocate was of the opinion that in the circumstances of the matter as relayed to him by the junior legal practitioner, absolution from the instance was not final and thus not appealable. It appeared to the instructing legal practitioner that a misunderstanding between the junior legal practitioner and the advocate had occurred. This, according to the instructing legal practitioner, is so because the refusal of absolution from the instance is not appealable while the granting of absolution from the instance is appealable as of right.

[18] It was therefore on the basis of this misunderstanding that the junior legal practitioner proceeded to have the case re-enrolled, for the omitted documents to be discovered, and tendered into evidence.

[19] The deponent to the supporting affidavit stated that on 1 August 2019 the junior legal practitioner addressed a letter to the respondent's legal practitioner stating that she would request the court *a quo* to reopen the case on the basis of new evidence. The legal practitioner of the respondent did not respond and a follow up letter was sent to respondent's legal practitioner, followed by another follow up letter

on 7 October 2019. On 8 October 2019, respondent's legal practitioner replied by a letter stating that the documents not admitted at the trial could not now be placed before the court *a quo*. He disagreed that the case could be reinstated.

[20] Subsequently, further correspondences between the parties were exchanged without any agreement, and on 30 October 2019 the junior legal practitioner filed a rule 32(10) report.¹

[21] Further correspondence was exchanged between the parties regarding the taxation of the bill of costs. The bill of costs amounted to N\$880 100. A request for the postponement of the taxation for one week was refused and the bill of costs was taxed in the absence of appellant's legal practitioner. The *allocatur* was issued for an amount of N\$739 624,38.

[22] An application to have the *allocatur* reviewed and set aside followed. In the affidavit in support of the review application, the appellant's misunderstanding of the law was maintained. On 13 February 2020, the reinstatement application to have the matter re-enrolled on the case management roll was filed.

[23] On 6 March 2020, the reinstatement application was heard and removed from the roll for a managing judge to be allocated. Thereafter the appellant brought an urgent application in which it sought an order suspending the execution of the writ issued on the *allocatur*, pending the review application.

¹ The Rules of the High Court require a litigant in interlocutory matters, before instituting the proceeding to file with the registrar details of the steps taken to have the matter resolved amicably.

[24] On 26 March 2020, the urgent application was struck from the roll on the basis of a technical point. The lockdown of the country due to the Covid-19 pandemic followed.

[25] On 5 May 2020, according to the instructing legal practitioner, a new summons was issued against the respondent. It is not clear why this new summons was issued, because although the instructing legal practitioner stated that this summons was annexed to this condonation application, there was none.

[26] The appellant's legal practitioner alleged that during the lockdown, the respondent's legal practitioner attempted to coerce the deputy-sheriff into executing upon the writ.

[27] The appellant's instructing legal practitioner stated that she instructed another advocate to prepare papers for an intended urgent application. It is not clear from the affidavit what the purpose of this intended urgent application was. However, appellant's instructing legal practitioner stated that it was during this process that she was advised that the order granting absolution from the instance was final and appealable, and was advised to consider bringing an appeal against the decision of the court *a quo*.

[28] The appellant's instructing legal practitioner stated that on 12 May 2020, the appellant launched an application for an order, pending the finalisation of the review application and/or pending an appeal to be instituted against the judgment of the

court *a quo*, interdicting and restraining the respondent from executing upon the taxed bill of costs. This was not an urgent application at that stage.

[29] According to appellant's instructing legal practitioner, when the respondent's legal practitioner again attempted to execute, the application was enrolled on an urgent basis and was heard on 20 May 2020 when a *rule nisi* was granted – which was in turn extended to 5 August 2020.

[30] The appellant's legal practitioner stated that she then instructed the advocate (who correctly advised her) to prepare a notice of appeal. The final papers were returned to her on 14 July 2020 for her consideration.

[31] The appellant then filed an application to this court erroneously in terms of the provisions of rule 5 of the Rules of the Supreme Court.²

[32] This application subsequently was heard by a single judge of this court. The matter was removed from the roll because the application was erroneously brought under rule 5. Appellant's instructing legal practitioner averred that it was at this stage that a senior counsel also advised that a condonation application must be lodged. It was, according to the instructing legal practitioner of the appellant, this process which culminated in the second notice of appeal and the application for condonation and reinstatement.

² Rule 5 of the Rules of the Supreme Court prescribes procedures on appeal, including time limits.

[33] Finally, it was stated that the reason why the notice of appeal was not filed within the time limits prescribed by the rule was because both the junior legal practitioner as well as herself (instructing legal practitioner) harboured under the mistaken belief that the order granting absolution from the instance was not final.

[34] The present condonation application was filed on 5 November 2020. The appellant's instructing legal practitioner, in her supporting affidavits, sets out in detail the prospects of success on appeal in respect of the merits of this case.

Submissions on appeal

[35] Instructed counsel referred to the reasons as provided by the instructing legal practitioner for the non-compliance with the Rules of this Court. He submitted that there was sufficient cause to grant condonation since the prospects of success on appeal were excellent. In support hereof, counsel pointed out that the provisions of the Act were not applicable to the credit sale agreement between the appellant and the respondent at the time the sale agreement was signed. This is a legal point raised for the first time on appeal. Counsel referred to authority which allows a litigant under certain circumstances to raise a legal point for the first time on appeal. Counsel also referred this court to legislation which support his submission that the provisions of the Act were inapplicable at that stage when the contract was concluded.

Analysis

The explanation

[36] The explanation provided for the non-compliance with the rules of court by the instructing legal practitioner was, in my view, a weak and an unpalatable explanation. I say this because a seasoned legal practitioner, like the instructing legal practitioner, could easily by way of a simple research have established the true legal position. Instead, she persistently and blindly (figuratively speaking) plodded on with litigation in the court *a quo* for more than a year, and unnecessarily so. A legal practitioner who acts on behalf of a client is expected to do so with due diligence. This was not done. In my view, it was not even necessary in the circumstances for a referral to an advocate for a legal opinion.

[37] Having said this, I do not doubt the *bona fides* of the instructing legal practitioner. I say this in view of her dogged persistence to have the trial reopened in the court *a quo* with the ultimate resolve to prove the appellant's claim successfully. The litigation in the court *a quo* bears testimony to her *bona fides*.

[38] In respect of the appellant's explanation itself, this court has in *Katjaimo v Katjaimo*³ quoted with the approval Steyn CJ in *Salojee & another NNO v Minister of Community Development*⁴ that:

‘There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the inefficiency of the explanation tendered “and that if a litigant “relies

³ *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC).

⁴ *Salojee & another NNO v Minister of Community Development* 1962 (2) SA 135 (A) at 141C. See also *Lewis v Sampoio* 2000 NR 186 (SC) at 193.

upon the ineptitude or remissness of his own attorney he should at least explain that none of it is to be imputed to himself.’

[39] I have no doubt that had the appellant been informed that the order of the court *a quo* was appealable, it would have prosecuted the appeal immediately. In these circumstances, and in particular its reliance on the incorrect legal advice from its legal practitioner, no blame can be accorded to the appellant itself for the failure to timeously comply with a rule of this court.

[40] This court has held that there is some interplay between the obligation of a litigant to provide a reasonable and acceptable explanation for the non-compliance with a rule of court, and the reasonable prospects of success on appeal. Thus, good prospects of success may lead to a condonation and reinstatement application being granted, in spite of the fact that the explanation for the non-compliance is weak or not entirely satisfactory,⁵ as it is in this instance.

Prospects of success

[41] The appellant in its heads of argument, argued, based on the provisions of the Act, that there are excellent prospects of success on appeal. In view of the legal point raised on appeal, I do not deem it necessary to consider those arguments.

[42] In respect of the legal point raised on appeal, this court in the matter of *Arangies v Neves & others*⁶ had held that parties had been ‘permitted to raise issues

⁵ *Namibia Power Corporation (Pty) Ltd v Kaapehi* (SA 41//2019) [2020] NASC (29 October 2020).

⁶ *Arangies v Neves & others* 2019 (3) NR 671 (SC) para 46-47.

of non-compliance or illegalities for the first time on appeal'. This court referred with approval to the matter of *Cole v Government of the Union of SA*⁷ where Innes J dealt with the same issue and remarked that there seemed to be no reason, either on principle or on authority, to prevent a litigant to take advantage of a legal point on appeal. It was also pointed out that if there was no unfairness to the party against whom it is directed, the court is bound to deal with it. The court held that: 'In presence of these conditions a refusal by a court of appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong'.

[43] Thus this court⁸ in *Arangies* echoed the sentiments of Innes J in *Cole* where it held that it 'would create an intolerable position if a court of appeal is precluded from giving the right decision on accepted facts merely because one of the parties had failed to raise a legal point'.

[44] The legal point in this appeal in a nutshell is to the following effect:

The Credit Agreements Act 75 of 1980⁹ provides in s 2(1) that the 'provisions of this Act shall apply to such credit agreements or categories of credit agreements as the Minister may determine from time to time by notice in the Gazette: . . . '.

⁷ *Cole v Government of the Union of SA* 1910 AD 263 at 272-273.

⁸ Per Smuts JA.

⁹ In terms of s 1 of Proclamation No. AG 17 of 1981 dated 27 May 1981, the Act was made applicable to Namibia (then the territory of South West Africa).

[45] The Minister by way of the Credit Agreements Proclamation No. AG 17 of 27 May 1981, under the powers vested in him by s 2 of the Act, determined that the provisions of the Act shall apply to ‘any transaction referred to in paragraph (a) of the definition of “credit transaction” in section 1 of the said Act’ . . . ‘against payment of a cash price of not more than R100 000 over a period of longer than three months’.

[46] In GN 141, GG 6052, 28 June 2016 the Minister under s 2 of the Act withdrew Notice No. AG 17 of 27 May 1981.

[47] The instalment sale agreement between the appellant and the respondent was concluded and signed by the parties on 11 December 2015. At this stage, the provisions of the Act were applicable only to those credit agreements where the cash price of the goods normally sold by the credit grantor was ‘. . . *not more than R100 000 . . .*’.¹⁰ The cash price of the motor vehicle sold to the respondent was N\$2 078 433,60 which is an amount more than N\$100 000. Thus the provisions of the Act were not applicable to the credit agreements between the parties. Notice No. AG 17 of 27 May 1981 was withdrawn on 28 June 2016, which was after the conclusion of the agreement.

[48] It is trite that ‘a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation. It is for that reason presumed that the legislature only intends to regulate future matters. Unless a contrary intention appears from new legislation which repeals previous

¹⁰ Emphasis provided.

legislation, it is presumed that no repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed'.¹¹

[49] Government Notice No. 141 of 28 June 2016 as a result did not affect any of the provisions of Government Notice AG 17 of 27 May 1981 which remained valid in respect of transactions concluded prior to 1 August 2016, the date Notice No. 141 was promulgated to come into operation.

[50] The legal point raised is to the effect that in giving effect to the existing and valid legislative provisions, as this court must do, the instalment sale agreement between the parties is not covered by any provisions of the Act, and the basis upon which the court *a quo* granted absolution from the instance would for this reason fall away. In the circumstances, the legal point raised on appeal must succeed.

[51] What remains is the evidence presented on behalf of the appellant. A certificate of indebtedness was attached to the summons. In terms of the instalment sale agreement such a certificate 'shall constitute conclusive proof of the matter therein stated for all purposes including pleadings, judgment and provisional sentence'. At this stage, the information contained in the certificate of indebtedness stands uncontroverted.

¹¹ *Kaknis v Absa Bank Ltd & another* 2017 (4) SA 17 (SCA) para 13 (reference to an authority omitted).

[52] Christians testified that the respondent had been notified of the fact that he was in arrears of payments, and subsequently respondent was informed by reason of his breach, that the agreement had been cancelled.

[53] In these circumstances, a court of law exercising its discretion judiciously would be correct to refuse an application for absolution from the instance on the basis that the appellant had presented evidence which *prima facie* establishes its claim, and which demands an answer from the respondent.

[54] In respect of the costs order of the court *a quo* the following observation: The written agreement provides that the appellant shall be entitled to costs on an attorney and client scale. There is no similar provision in favour of the respondent. The court *a quo* was clearly wrong in granting such a costs order.

[55] It is, in my view, also necessary to consider the issue of prejudice raised by the appellant in its founding affidavit. No opposing affidavit was filed and I must, in these circumstances, give due weight to those averments in the founding affidavit. In short, it amounts to an allegation of gross overreaching, euphemistically put, by the legal practitioner who acted on behalf of the respondent.

[56] I agree with the appellant that it stands to suffer serious prejudice if it is not allowed to proceed with the appeal. To disagree would, in effect, reward overreaching. In my view, this is a matter which ought to be brought to the attention of the Law Society of Namibia.

[57] At the conclusion of the appellant's case in the court *a quo* it had established a *prima facie* case and the trial judge was wrong in granting absolution from the instance.

[58] In my view, the appellant has shown very good prospects of success on appeal. This in turn should compensate for a weak explanation by the instructing legal practitioner, but as I found earlier, the appellant itself is not to be blamed for the ineptitude of its legal practitioner. In the circumstances there is sufficient cause to warrant the granting of condonation and to order the reinstatement of the appeal. The appeal should be upheld.

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

- (a) The appellant's non-compliance with a rule of this court is condoned and the appeal is reinstated.
- (b) The appeal is upheld.
- (c) The order of the High Court including the costs order is set aside and replaced with the following order:

The application for absolution from the instance is refused. Costs to be costs in the cause.

- (d) The matter is remitted to the High Court for a status hearing in order to obtain dates for the continuation of the trial.
- (e) Costs of the appeal to be costs in the cause.
- (f) The registrar is requested to bring this judgment to the attention of the Director of the Law Society of Namibia.

HOFF JA

SHIVUTE CJ

MAINGA JA

APPEARANCES

APPELLANT:

R Heathcote (with him J Jacobs)

Instructed by AngulaCo. Inc.

RESPONDENT:

No appearance