



NOT REPORTABLE

CASE NO: SA 87/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMRIGHTS INC

Appellant

and

GOVERNMENT OF NAMIBIA

First Respondent

OMBALANTU TRADITIONAL AUTHORITY

Second Respondent

OMBANDJA TRADITIONAL AUTHORITY

Third Respondent

SAM NUJOMA

Fourth Respondent

NAMTRANSLATION SERVICES CC

Fifth Respondent

ELIZABETH NYEUVO EKANDJO

Sixth Respondent

OMBUDSMAN

Seventh Respondent

EVANGELICAL LUTHERAN CHURCH IN NAMIBIA

Eighth Respondent

NAMIBIAN CHAMBER OF COMMERCE AND

INDUSTRY

Ninth Respondent

NAMIBIA TOURISM BOARD

Tenth Respondent

NAMIBIA NATIONAL FARMERS' UNION

Eleventh Respondent

NAMIBIA AGRONOMIC BOARD

Twelfth Respondent

NAMIBIA ARTS COUNCIL

Thirteenth Respondent

WOMEN'S LEADERSHIP CENTRE

Fourteenth Respondent

WOMEN'S SOLIDARITY OF NAMIBIA	Fifteenth Respondent
SISTER NAMIBIA	Sixteenth Respondent
WOMEN'S ACTION FOR DEVELOPMENT	Seventeenth Respondent
LEGAL ASSISTANCE CENTRE	Eighteenth Respondent
LIFELINE-CHILD LINE NAMIBIA	Nineteenth Respondent

Coram: SHIVUTE CJ, SMUTS JA, and UEITELE AJA
Heard: 13 April 2023
Delivered: 28 April 2023

Summary: The appellant filed an appeal on 23 December 2019 following the dismissal on 6 December 2019 of an application it brought in the High Court. Several breaches of court rules ensued. Firstly, the record of appeal was not filed within the time limit of three months as per rule 8(2)(b) of the Rules of the Supreme Court. The appellant filed two volumes purporting to be a record of appeal in July 2020. The two volumes only consist of the transcript of the oral submissions made before the court below. The pleadings were not included. Nor was the judgment and order of the High Court or the notice of appeal part of the record even though the judgment was attached to the notice of appeal and provided on the court file. On 18 August 2020, the registrar of this Court informed the appellant in writing that the appeal was deemed to have been withdrawn due to non-compliance with rule 8. Appellant brought an application for condonation and reinstatement of the appeal, which application was opposed by the first to fourth respondents. Secondly, appellant failed to comply with rule 14(2) and (3) relating to the filing of security for costs; and thirdly, the late filing of its heads of argument (which did not comply with the rules and were not accompanied by a bundle of authorities as is peremptorily required in rule 21). A condonation application relating to security and the late filing of the heads of argument was also served before this Court at a late stage, although security was not provided.

Appellant was put on terms on at least two occasions concerning these non-compliances before the hearing on 13 April 2023 (ie in the respondents' answering affidavit opposing the condonation application for the late filing of the record of appeal and in their heads of argument when the appeal was initially set down for hearing on 8 April 2022), however appellant has failed to address these fundamental inadequacies.

Held, the failure to place a proper record of appeal, before this Court means that this court is simply unable to assess the prospects of success on appeal and thus the condonation application. The appellant's conduct in preparing this appeal amounts to a reckless disregard of the rules and a failure to appreciate the fundamental nature of appeals. Quite how the appellant could consider that a court of appeal can adjudicate an appeal in the absence of the pleadings (and evidence) was not explained by its representative. A court is entirely unable to do so.

Held, appellant is wrong to rely on *Xinwa & others v Volkswagen of SA (Pty) Ltd* 2003 (4) SA 390 (CC). The *dictum* relied upon relates to the preparation of pleadings and that lay litigants should not be held to the same accuracy, skill and precision in pleadings as required of lawyers. It is not however authority for the proposition that the rules should not apply equally to all persons who litigate in the courts. The rules of court apply equally to all.

Consequently, the applications for condonation and reinstatement of the appeal are dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and UEITELE AJA concurring):

Introduction

[1] The High Court on 6 December 2019 dismissed an application brought by the appellant. A notice of appeal was filed but a record was not provided within the time limit of three months after the judgment was given, as is provided for in rule 8(2)(b) of

the rules of this Court. Two volumes purporting to constitute the record were only filed in July 2020.

[2] The registrar of this Court accordingly informed the appellant in writing on 18 August 2020 that the appeal was deemed to have been withdrawn by reason of the failure to file a record in accordance with rule 8(2)(b). The appeal had thus lapsed.

[3] The two volumes filed by the appellant in July 2020, purporting to comprise the record, however only consist of the transcript of the oral submissions made before the court below. The pleadings were not included. Nor was the judgment and order of the High Court or the notice of appeal as part of the record even though the judgment was attached to the notice of appeal and provided on the court file.

Condonation applications

[4] The appellant subsequently filed a condonation application on 20 October 2020 – to condone the failure to file its (incomplete) record timeously and also seeking reinstatement of the appeal. That application was opposed by the first to fourth respondents. In their answering affidavit of December 2020, it was pointed out that the volumes purporting to constitute the record were hopelessly inadequate in that the pleadings (in the form of the notice of motion and affidavits) and the judgment and notice of appeal were absent from that purported record.

[5] The matter was set down for hearing on 8 April 2022 but did not proceed owing to the ill health of the representative of the appellant. The matter was thereafter set down for hearing on 13 April 2023.

[6] Prior to the previous set down, the respondents filed heads of argument in March 2022 in which the point was again squarely taken that the appellant's attempt to file a record fell far short of meeting the requirements of rules 8 and 11 in that the pleadings, judgment and notice of appeal did not form part of the record and making it clear that what had been filed as the record was irrelevant to an appeal.

[7] Despite having received notice in these very clear terms of the fundamental inadequacy of the record in December 2020 and again in March 2022, the appellant took no steps to provide a proper record in the intervening period of more than a year before the current set down and has furthermore also provided no explanation for the failure to rectify the inadequacy of the record.

[8] The respondents likewise pointed out in their heads of argument in March 2022 that the appellant had failed to comply with rule 14(2) and (3) of the rules of this Court, relating to the filing of security for costs. Despite being thus notified of this failure to comply with rule 14(2) and (3) more than a year ago, the appellant has also in this respect taken no steps since then to do so.

[9] The appellant did however file heads of argument in respect of the merits of the appeal on 15 March 2023. Heads of argument were subsequently filed by the appellant in respect of its application for condonation together with another condonation application in respect of the late filing of its heads of argument and for failing to comply with rule 14 relating to the filing of security for costs. The heads of argument filed by the appellant did not however comply with the rules and were not accompanied by a bundle of authorities as is peremptorily required in rule 21.

[10] In both of the appellant's condonation applications, the appellant expressly acknowledges the two pronged nature of the requirement of good cause which needs to be established in condonation applications.

[11] The well settled test in condonation applications requires applicants seeking condonation to provide a reasonable and acceptable explanation for the non-compliance and secondly to satisfy this court that there are reasonable prospects of success on appeal. As has been repeatedly stressed, there can be some interplay between these two criteria, such as may occur where prospects of success are overwhelming and the public importance of an issue may lead to the condonation being granted even where the non-compliance was not satisfactorily explained.¹ It has however also been held that ordinarily where there is no acceptable explanation for a glaring or flagrant non-compliance with the rules, the application may be dismissed without consideration of the prospects of success on appeal.²

[12] Whilst this court has accepted that there may thus be a degree of interplay between these two criteria, there can be no possibility of making the required assessment of the merits without the record of proceedings.

Defective record

¹ *Road Fund Administration v Scorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) paras 2-3.

² *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 34 and as applied in *Tweya & others v Herbert & others* (SA 76/2014) [2016] NASC 13 (6 July 2016).

[13] The record filed by the appellant only comprises a transcript of oral argument before the court below. As is expressly stated in rule 11(8)(a) a record should not contain a transcript of oral argument, unless essential for the determination of the appeal. It is in essence irrelevant unless reasons exist for its inclusion. No reasons for its inclusion were placed before us. The pleadings in this matter have not been included in the record – comprising the notice of motion, founding affidavit(s), answering affidavit(s) and replying affidavit(s). Quite how the appellant could consider that a court of appeal can adjudicate an appeal in the absence of the pleadings (and evidence) was not explained by its representative. Plainly a court is entirely unable to do so. The absence of the judgment of the High Court and the notice of appeal from the record is also fatal although the notice was filed with the court with the judgment attached to it. But these items should form part of and be bound in the record.

[14] Despite being put on terms on at least two occasions concerning the hopeless inadequacy of the record, the appellant however failed to address those inadequacies. The conduct of the appellant in this regard amounts to a reckless disregard of the rules and a failure to appreciate the fundamental nature of appeals. The appellant's representative asserted that the notice of appeal and its heads of argument sufficiently apprised this court of the issues in dispute. But this can never be so. Without a record, there can plainly be no adjudication on appeal. An appeal court after all is required to consider the correctness of the order of the court below. Without being apprised as to what served before that court by way of pleadings or evidence, this function can of course not be performed.

[15] The failure to place a proper record of proceedings, before this Court means that the court is simply unable to assess the prospects of success on appeal. There can thus be no question of condonation for the late filing of the inept attempt at a record, comprising only irrelevant material or for the failure to comply with rules 14 and 17.

[16] This is quite apart from the other manifold failures to comply with other rules of this court for which condonation was not sought.

[17] Given the multiple non-compliances with the rules, the appeal falls to be struck from the roll. The appellant's representative pointed out that the appellant was not legally represented and in the position of the lay person and should be accorded latitude in complying with the rules relying on what was said in *Xinwa & others v Volkswagen of SA (Pty) Ltd*.³ The *dictum* relied upon relates to the preparation of pleadings and that lay litigants should not be held to the same accuracy, skill and precision in pleadings as required of lawyers. It is not however authority for the proposition that the rules should not apply equally to all persons who litigate in the courts. The rules apply equally to all.

[18] It follows that the applications for condonation are to be dismissed. As to the question of costs, the respondent's counsel also sought an order for the costs relating to the postponement of the matter on 8 April 2022 when there was no appearance on behalf of the appellant and no proper postponement application.

³ *Xinwa & others v Volkswagen of SA (Pty) Ltd* 2003 (4) SA 390 (CC) para 13.

[19] The appellant's representative argued that the appeal concerned the assertion of constitutional rights and that the appellant should not be mulcted with costs in doing so, referring to the South African case of *Biowatch*.⁴ In that matter, the Constitutional Court held that in litigation between private parties and government, where a private party unsuccessfully seeks to assert a constitutional right, each party would bear its own costs. In *Biowatch*, the Constitutional Court made it clear that this general approach is not unqualified, adding:

'If an application is frivolous or vexatious or in any way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.'⁵

[20] It is not necessary for present purposes to decide whether and the extent to which the principle articulated in *Biowatch* should be applied in this court because we are unable to access its applicability in the absence of the record of proceedings. Costs should in accordance with the usual principle follow the result.

Order

[21] The following order is made:

1. The appellant's applications for condonation and reinstatement of the appeal are dismissed with costs.

⁴ Reported at *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) paras 20, 23-24.

⁵ Paragraph 24. See also *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands & Resettlement & others* 2018 (3) NR 800 (SC) paras 124-126.

2. The appellant is directed to pay the first to fourth respondents' costs occasioned by the postponement of the matter on 18 April 2022.

3. The costs orders referred to in paragraphs 1 to 2 of this order are to include the costs of one instructing legal practitioner and one instructed legal practitioner.

SMUTS JA

SHIVUTE CJ

UEITELE AJA

APPEARANCES

APPELLANT: In person

FIRST TO FOURTH RESPONDENTS: D Khama
Instructed by Government Attorney