**REPORTABLE**

CASE NO: SA 25/2020

**IN THE SUPREME COURT OF NAMIBIA**

In re:

***EX PARTE* APPLICATION OF**

**ALEX KAMWI MABUKU KAMWI** **Applicant**

**CORAM:** SHIVUTE CJ, SMUTS JA and FRANK AJA

**Heard:** **14 March 2023**

**Delivered:** **16 May 2023**

**Summary**: The applicant unsuccessfully applied for admission to practise as a legal practitioner of the High Court of Namibia. The High Court found that the applicant did not meet the requirements for admission set out in the Legal Practitioners Act 15 of 1995 (the Act). The applicant appealed against that decision to the Supreme Court. While the applicant filed the notice of appeal on time, he neglected to file the record of appeal within the period set out in the Rules of the Supreme Court. He did not comply with many other rules of the Rules of Court. His appeal was then deemed to have been withdrawn. He subsequently brought an application for condonation, arguing in the main that he could not file the record on time because he was waiting for the outcome of his application for legal aid and that he did not have funds to travel from Katima Mulilo where he resided to file court documents in Windhoek. He explained further that there were good prospects of his appeal succeeding as he was duly qualified and was

furthermore recognised by judges in two cases in which he appeared in person as someone whose skills were on par with those of legal practitioners.

The court considered the explanation given for the failure to file the record of proceedings on time and for the failure to provide for security for costs, noting that there was no condonation application nor explanation for the failure to comply with many other rules. The court furthermore set out in some detail the statutory requirements for qualification for admission as legal practitioner and the academic as well as professional qualifications related thereto.

*Held that,* although the explanation for the non-compliance with the rules of court was not satisfactory, the circumstances of the case required that the merits of appeal be considered as part of the determination of the prospects of success in the application for condonation;

*Held that,* it was clear as day light that the applicant had not met the requirements set out in the Legal Practitioners Act 15 of 1995 for admission and authorisation to practise as a legal practitioner in Namibia.

*Held that,* although the applicant appears to possess a degree in law that qualifies him to undergo a course of post-graduate studies at the Justice Training Centre, he had not complied with the remaining statutory requirements that could entitle him to apply for admission and authorisation to practise as a legal practitioner.

*Held that,* the course of practical legal training the applicant asserts he underwent was not the type of practical legal training contemplated in the Legal Practitioners Act.

*Held that,* remarks made by a judge during the course of proceedings or in a judgment about a lay litigant’s skills in conducting his or her case do not confer on such litigant the status of a legal practitioner.

*Held that,* there could be no admission as a legal practitioner in Namibia beyond the scope and ambit of the Legal Practitioners Act.

*Held that,* as there were no prospects of the appeal succeeding, the application for condonation stood to be dismissed.

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**APPEAL JUDGMENT**

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SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

Introduction

[1] In this application for condonation for the late filing of the record of proceedings, the applicant has appealed against the judgment of the High Court dismissing his application, curiously brought in that court *ex parte*, for admission and authorisation to practise as a legal practitioner. The Law Society of Namibia (the LSN) was nevertheless served with the application and was ultimately granted leave to intervene in opposition to it. The High Court found that the applicant had not met the requirements for admission and enrollment as a legal practitioner and so the application was dismissed. The applicant then filed a notice of appeal to this court a day after the delivery of the judgment.

[2] Although the appeal was lodged on time, the applicant did not file the record of proceedings within three months from the date of the judgment appealed against as required by the applicable rule of the Rules of this Court. Accordingly, his appeal was deemed to have been withdrawn and he was so informed by this court's registrar in a letter dated 18 August 2020. He subsequently brought an application for condonation only – and not for the reinstatement of the appeal also – for the failure to timeously file the record of proceedings of the court appealed from.

[3] Yet, he seemingly did not comply with a multiplicity of other rules of court, including the one relating to the provision of security for costs or requiring an appellant to show that the respondent had waived its right to security or at any rate that the applicant had been released from the obligation to provide security; the failure to hold a meeting with the respondent with a view to eliminating portions of the record which are not relevant for the determination of the issues on appeal; and the failure to obtain a court direction to produce 51 pages long heads of argument instead of the permissible 40 pages. In respect of those infractions, there is neither an application for condonation – and with the exception of the failure to provide security – nor any explanation whatsoever.

[4] Until the date of hearing, there was no indication that the application for condonation would be opposed. The LSN did not file a notice to oppose the appeal. The legal practitioner appearing for it correctly pointed out that at that time the rules did not require this to be done. But even then, the LSN did not file heads of argument in accordance with the rules. Instead, it filed what was referred to as 'notes on argument' on the actual date of the hearing. In those notes, it was averred that the LSN became aware only the day before the hearing that the matter was on the roll. It was further stated in the notes that the applicant had served on the LSN his notice of appeal, his heads of argument and bundle of authorities on 1 March 2023.

[5] The assertion made on behalf of the LSN elicited a sharp response from the applicant who pointed out that additional to the documents acknowledged by the LSN, his notice of appeal and the record of proceedings in the High Court were also served on the LSN on 8 May 2020 and 6 April 2021 respectively. The applicant pertinently argued – doubtless, a contention that would have made the LSN overcome with mortification – that the LSN did not even file a power of attorney authorising the legal practitioner to appear on its behalf in the current proceedings.

[6] The legal practitioner for the LSN conceded that the documents referred to by the applicant were indeed served on the LSN, but submitted that because the appeal was deemed to have been withdrawn on account of the failure to file the record of proceedings on time, no action was taken in relation thereto. But this explanation must be considered in the context that the record of appeal belatedly filed by the applicant was accompanied by an application for condonation. Why no action was taken after receipt of the application for condonation has not been explained. The LSN's attitude towards the purported appeal and the application for condonation is unsettling to say the least and is a matter to be commented upon further when dealing with the issue of costs. For now, the focus should shift onto the consideration of the application for condonation in some detail.

[7] It is now a settled principle that for the application for condonation to succeed, there must be in the first place a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of the appeal succeeding. It is also an accepted principle that there may be interplay between the obligation to provide a satisfactory explanation for the non-compliance and the reasonable prospects of success on appeal.[1] It is in this legal context that the application will be considered.

Application for condonation

*Explanation*

*Failure to timeously file the record*

[8] The explanation proffered by the applicant for the failure to file the record of proceedings on time was that on 29 May 2020, the applicant applied for legal aid while in

[1] See, for example, *De Klerk v Penderis* NO (SA 76-2020) [2023] NASC (1 March 2023).

Katima Mulilo where he resided. As he had received no response to his application, he travelled to Windhoek on 6 August 2020 to enquire on progress. He was informed that he should file a fresh application as the one he made earlier had not been received by Legal Aid. On 19 October 2020, he received a response from Legal Aid declining his application. The applicant explained further that he was a pensioner who had insufficient financial resources to frequently travel to Windhoek to file court documents and that as many more litigants request the transcription of records, 'this also contributed to the late filing the record'.

*Failure to provide security*

[9] As to the failure to provide security for costs, the applicant argued that the appeal and/or the application for condonation were made *ex parte*. As there was no respondent to the proceedings, there was no need for the provision of security for costs.

*Prospects of success*

[10] The explanation given in respect of the prospects of success was that the applicant was 'recognised' in a judgment of the Supreme Court in which he acted in person 'as a qualified private investigator, paralegal professional and qualified legal adviser having the same expertise as that of a lawyer and thus not a layperson'. He was also referred to in the judgment of the High Court as a 'legal adviser', which in his understanding is a recognition that the court treated him like a legal practitioner. Therefore, on the basis of the qualifications he had acquired and on the strength of the recognition of his skills in those judgments, the High Court should have granted his application for admission and authorisation to practise as a legal practitioner.

Determination

[11] The applicant did not have to wait for the outcome of his application for legal aid to file the record. He could have complied with the rule while awaiting the response from Legal Aid. The High Court judgment was delivered on 7 May 2020. The appeal, as noted earlier, was lodged on 8 May 2020. The applicant initially applied for legal aid on 29 May 2020 and re-applied for the same on 6 August 2020. He had ample time to file the record. At the very least, he could have requested for the transcription of the record and attended to its filing when he travelled to Windhoek to enquire about progress on his application for legal aid. Furthermore, the assertion that there was no respondent to the proceedings is disingenuous, because despite the lapsed appeal not having had a respondent in its citation, the applicant was not only fully aware that the LSN participated in the proceedings in the High Court, but in his affidavit in support of the application for condonation in this court he explicitly acknowledged the LSN as the respondent.

[12] Where an appeal is deemed to have been withdrawn or has lapsed due to the failure to comply with court rules, it is customary in an application for condonation to consider also the merits as part of the consideration of the prospects of success on appeal. The

exception to this general rule is where the non-compliance is so glaring or flagrant that an application for condonation may summarily be dismissed without considering the merits. I consider that despite the unsatisfactory and selective explanation given for the failure to comply with the rules, it is necessary on the facts and circumstances of this application for the merits to be considered to determine if there are prospects of success on appeal as part of the overall consideration of the application for condonation.

## The merits in the condonation application

[13] In the High Court, the applicant alleged that he was a holder of a Bachelor of Laws Degree obtained from the Open University of Tanzania, which qualification had been prescribed by the Minister of Justice in terms of s 5(4)(*a*) of the Legal Practitioners Act 15 of 1995 (the Act). The Minister of Justice (the Minister) is the functionary responsible for the administration of the Act. The applicant also stated that he had passed a two-year practical legal training course at a training institution called Oxbridge Academy in South Africa from which institution he had obtained a Diploma in Legal Studies. This qualification is additional to a Diploma in Legal Studies he obtained from an educational institution based in the United States of America. He thus averred that on the basis of these qualifications and on the basis of the 'recognition' he had received in the two cases where he appeared in person, he meets the statutory requirements set out in ss 4 and 5 of the Act and is thus qualified for admission and authorisation to practise as a legal practitioner.

## Statutory requirements for admission and authorisation to practise as a legal practitioner

[14] The Act sets out an elaborate scheme for admission of legal practitioners in Namibia. The overall scheme appears to be an attempt to strike a balance and accommodate not only lawyers who were already practising as such before the commencement of the Act, but also those who were to be trained at the only local university at the time of its promulgation, the University of Namibia, and those that had obtained degrees in law or equivalent qualifications from educational institutions situated outside Namibia. Institutions responsible for the training of future lawyers and supervising their training were also set up under the Act.

[15] The University of Namibia established the Justice Training Centre (the Centre)[2] where a 'course of post-graduate study' for the training of aspiring lawyers – referred to in the Act as candidate legal practitioners – will be provided. The phrase 'course of post-graduate study' is defined in the Act as meaning 'the course for the training of candidate legal practitioners referred to in section 16'.

[2] Section 16(1).

[16] Section 8(1) establishes the Board for Legal Education (the Board), consisting of 11 members.[3] The functions of the Board are set out in s 11.[4] Section 3 provides that no person shall be admitted and authorised to practise as a legal practitioner or be enrolled as such, except in accordance with the provisions of the Act.

[17] Upon completion of the period of the post-graduate study, the Centre must conduct the Legal Practitioners' Qualifying Examination (LPQE) under the control of the Board and make the examination results available to it for approval.

[18] The requirements for admission and enrollment as a legal practitioner are set out in ss 4 and 5 of the Act. Section 4 provides:

> 'Subject to the provisions of this Act, the Court shall admit and authorise to practise as a legal practitioner any person who, upon application made by him or her, satisfies the Court that he or she –
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> (a) is a fit and proper person to be so admitted and authorised;
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> (b) is duly qualified in accordance with the provisions of section 5; and
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> (c) . . .'[5]

[19] The requirements relating to academic and professional qualifications are set out in s 5. The default position is that a person is duly qualified for the purposes of s 4(1) if he or she holds a degree in law from the University of Namibia or an equivalent qualification in law from a university or comparable educational institution situated outside Namibia

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[3]The constitution of the Board is provided for under s 8(2) as follows:
'The Board shall consist of -
(a) the Chief Justice, who shall be the chairperson of the Board;
(b) four persons appointed by the Minister, of whom one shall be a person employed in connection with the training of candidate legal practitioners at the Centre;
(c) one legal practitioner in the full-time service of the State appointed by the Attorney-General:
(d) the Prosecutor-General;
(e) the Dean of the Faculty of Law of the University of Namibia; and
(f) three legal practitioners appointed by the Council.'

[4] They include the following: to register candidate legal practitioners for training at the Centre and to keep a register of such persons; to lay down guidelines in relation to the nature of practical training to be provided to candidate legal practitioners and by legal practitioners to whom they are attached; to act as moderator for the Legal Practitioners' Qualifying Examination or to appoint persons to act as such; and to issue certificates to candidate legal practitioners who have passed the Legal Practitioners' Qualifying Examination.

[5] Sub-paragraph (c) relates to the citizenship or other legal status of the person to be admitted and authorised to practise. As there is no dispute about the applicant's citizenship, the paragraph is omitted here.

which has been recognised by the Minister, and he or she has been issued with a certificate by the Board stating that such person has satisfactorily undergone practical legal training and has passed the LPQE.[6] Sub-section 4 provides that the Minister may from time to time, on recommendation of the Board, prescribe by notice in the *Gazette* for the purpose of s 5(1)*(a)* any degree or qualification in law obtained from a university or comparable educational institution in a foreign country, the legal system of which is based on common law.[7] The Minister may do likewise, for purposes of s 5(1)*(c)* in respect of a degree or equivalent qualification in law obtained from an educational institution situated in a foreign country, the legal system of which is not based on common law.[8]

[20] Persons who obtained qualifications in law from non-common law countries and whose qualifications have been prescribed by the Minister are required to undergo a course of one year undergraduate study provided by the University of Namibia's Faculty of Law and must pass all the examinations and fulfil all the requirements before they can register for the post-graduate course at the Centre.[9] They may be admitted and authorised to practise as legal practitioners only if they have met the above requirements and have been certified by the Board as having satisfactorily undergone practical legal training and having passed the LPQE.

[21] Another important requirement in the process leading to admission as a legal practitioner is that a candidate legal practitioner is required to undergo practical legal training under attachment to a legal practitioner – referred to in the Regulations as the principal – for the period of the duration of the post-graduate course[10] or after passing the LPQE if so permitted by the Board[11] and upon completion, he or she is required to submit a diary containing details of the practical legal training undergone under attachment to the Programme Director, who is the head of the Centre.[12]

[22] Persons who held prescribed qualifications under the Attorneys Act 53 of 1979 as qualifications entitling them to be admitted as attorneys before the commencement of the Act and who had successfully completed their articles and passed the practical examinations for admission of attorneys qualified for admission as legal practitioners.[13]

[23] Persons who were already admitted as attorneys and advocates prior to the commencement of the Act were automatically enrolled by the Registrar of the High Court as legal practitioners and were deemed to have been admitted and authorised to practise as such.[14]

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[6] Section 5(1)*(a)*.
[7] Section 5(4)*(a)*.
[8] Section 5(4)*(b)*.
[9] Section 5(1)*(c)*(i).
[10] Regulation 8(1) of the Candidate Legal Practitioners Regulations made under s 81(1) of the Act.
[11] Regulation 8(2)
[12] Regulation 9(1).
[13] Section 5(1)*(b)*.
[14] Section 6(1).

[24] Another category of persons who qualified to be admitted as legal practitioners are those whose names appear on the list, register or roll of legal practitioners kept by a competent authority of any country specified in Schedule 3 to the Act, provided that such persons have, upon application, been exempted by the Board from complying with the requirements of subparagraph (i)[15] and subparagraph (ii)[16]. The Board may partially or wholly exempt the person from complying with the said requirements.[17] Where conditional exemption has been granted, the person must first comply with any condition subject to which the exemption had been granted by the Board prior to qualifying for admission and authorisation.[18]

[25] The Act was amended in 2002 to cater for an additional category of persons who are deemed qualified to be admitted and authorised to practise as legal practitioners without complying with the requirements of practical legal training and passing the LPQE. This category comprises magistrates, prosecutors and legal aid counsel who performed duties in the service of the State. Accordingly, a person who holds a degree in law or equivalent qualification in law obtained from the University of Namibia or from an equivalent educational institution from outside Namibia which has been prescribed by the Minister, and who has been issued with a certificate by the Minister, after consultation with the Board, stating that such person had for a continuous period of five years, and to the satisfaction of the Minister, performed duties as a magistrate or Director of Legal Aid or legal aid counsel, qualifies for admission and authorisation to practise as a legal practitioner.[19] If the person concerned performed duties as a public prosecutor in the Office of the Prosecutor-General, the certificate in question is issued by the Attorney-General.[20]

[26] The requirements for admission have been set out in detail to demonstrate that the Act provides for different scenarios in terms of which a person may be admitted and enrolled as a legal practitioner. In this exercise, reference was not made to the provisions of s 85(2) of the Act, precisely because the section is not implicated on the facts of the matter before us. Therefore, the refrain in the applicant's affidavit and submissions that the provisions relating to the requirements for admission as legal practitioners somehow discriminate against persons who hold degrees or equivalent qualifications in law obtained from educational institutions situated outside Namibia is entirely unfounded.

[27] As noted earlier, the applicant is a holder of an academic qualification that entitles him to proceed to follow the other requirements of the Act so that he can conclude the admission and authorisation process. His degree obtained from the Open University of Tanzania appears to have been prescribed by the Minister. The remaining procedural steps are for him to attend the course of post-graduate study offered at the Centre; undergo practical legal training; pass the LPQE; be certified by the Board that he has met all those

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[15] Section 5(1)*(a)*(i): Regarding the need to have had satisfactorily undergone practical legal training.

[16] Section 5(1)*(a)*(ii): Regarding the need to have passed the Legal Practitioners' Qualifying Examination.

[17] Section 5(1)*(d)*(i).

[18] Id.

[19] Section 5(1)(cA)(i).

[20] Section 5(1)(cA)(ii).

requirements, then show that he is a fit and proper person to be admitted as a legal practitioner through a substantive application for admission in the High Court. It is only then that he may be admitted and authorised to practise as a legal practitioner in Namibia. Had he taken these steps, the applicant may well have been admitted as a legal practitioner by now. Instead, much of his energy, time and expense appear to have been expended on a single objective: to get admitted and enrolled as a legal practitioner outside the provisions of the Act. This single-minded objective is wholly unattainable.

[28] It is apparent from the record that the applicant had brought four unsuccessful applications in the High Court to be admitted invariably as a para-legal, 'para-legal practitioner' and/or legal practitioner. The mounting of multiple and entirely unmeritorious applications for admission when either there is no legal framework on the basis of which this may be done or when the applicant has self-evidently not met the requirements for admission seems likely to have caused the LSN to incur unnecessary costs in opposing the applications. The Act empowers the LSN to appear in support of or in opposition to proceedings brought in terms of the Act and it would appear that the LSN would be entirely justified in opposing the type of proceedings lodged by the applicant to meet some of its objects set out in s 41 of the Act.[21] It eludes comprehension why the applicant should repeatedly make applications for admission when it is clear as daylight that he has not complied with the requirements set out in the Act.

[29] It is clear from what has been said hereinbefore that there are no good prospects of the applicant's appeal succeeding even if its reinstatement was sought, which has not been done. The practical legal training the applicant allegedly underwent is not the type contemplated by the Act. Furthermore, remarks made in a judgment about a lay litigant's ability to conduct his or her case at a level on par with or comparable to a legal practitioner do not confer a status of a legal practitioner on such a litigant. In any event, a close reading of the remarks made about the applicant in the judgments or proceedings he referred to shows that he interpreted what was said about him way out of context. As illustrated above, there can be no admission and authorisation to practise as legal practitioner in Namibia beyond the scope and ambit of the Act. As there are no prospects of the appeal succeeding even if it was possible for it to be reinstated gratuitously, the application for condonation is bound to be dismissed.

## Costs

[30] Turning to costs, the LSN approached the proceedings in a lackadaisical manner. There were three matters on the court roll this term in which the applicant and the LSN were parties. Despite this consideration and the history of litigation between the parties, the LSN did not take steps to oppose the appeal. The record of proceedings, the application for condonation and the applicant's heads of argument were served on it. Yet, despite this having been done, the LSN did not file heads and its instructed legal practitioner came on record only on the day of the hearing. But even then, without having filed a power of attorney. In those circumstances, the court should mark its displeasure towards this conduct by not making a costs order.

[21] Section 42(k).

Order

[31] In the result, the following order is made:

(a) The application for condonation is dismissed.

(b) No order as to costs is made.

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**SHIVUTE CJ**

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**SMUTS JA**

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**FRANK AJA**

APPEARANCES

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|---|---|
| APPLLICANT: | In person |
| RESPONDENT: | H Garbers-Kirsten<br>Instructed by Köpplinger Boltman Legal Practitioners |