



REPORTABLE

CASE NO.: SA 65/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GERHARD DE WET

Applicant

and

ALEXANDER WERNER KLEIN

Respondent

Coram: MAINGA JA, ANGULA AJA and MAKARAU AJA

Heard: 30 October 2023

Delivered: 30 November 2023

Summary: This is an application for condonation for the late filing of the applicant's notice of appeal. The applicant intends to appeal against a judgment/order of the court *a quo* granting absolution in an action where he was the plaintiff *a quo*. The

judgment/order granting absolution was delivered on 25 February 2021. The applicant however only filed the notice of appeal on 29 July 2021, which was more than 21 days from the date of the judgment/order sought to be appealed against. The applicant's counsel submitted that the delay was on account of the applicant's legal team's wrong understanding of the law as regards to appeals against orders/judgments granting absolution. *Per contra*, the respondent submitted that, had the applicant's counsel researched on the issue, they would have established that an order granting absolution can be appealed against as of right and that this is the settled position of the law.

The applicant had instead sought to impugn the order granting absolution by way of a review under s 16 of the Supreme Court Act 15 of 1990. He was not successful.

Held that; orders granting absolution are appealable.

Held that; the applicant's explanation for the non-compliance with the rules is inexcusable and rejected.

The application is dismissed with costs.

APPEAL JUDGMENT

MAKARAU AJA (MAINGA JA and ANGULA AJA concurring):

Introduction

[1] This is an application for condonation for the late noting of an appeal. If successful, the applicant intends to appeal against the entire judgment and orders of the High Court (court *a quo*), delivered on 25 February 2021, absolving the respondent from the instance in a suit brought by the applicant as detailed below. The applicant purported to file a notice of appeal on 29 July 2021. In terms of rule 7(1) of

the Rules of this Court, an applicant must file a notice of appeal within 21 days from the date of judgment and order(s) appealed against. The applicant, having filed the notice of appeal out of the time prescribed by the rules, filed the application in *casu*, seeking the court's indulgence.

[2] Due to the late filing of the appeal, certain further consecutive steps were also not taken within the stipulated timeframes. The record of proceedings in the court *a quo* was not filed within three months from the date of judgment and orders appealed against, the parties met late to discuss the record, there was late compliance with the rule on security for costs, and the power of attorney was also filed out of time. The applicant effectively did not comply with rules 7(1), 7(6), 11(10) and rules 14(2) and (3) of the Supreme Court Rules.

[3] Whilst it is not essential for the determination of the application for condonation, I set out below a brief summary of the litigation *a quo* that gave rise to the need on the part of the applicant to appeal to this Court.

[4] Omeya Home Ownership Association is a Section 21¹ company duly incorporated in accordance with the laws of Namibia. The parties at times refer to it as the Omeya Golf and Estate Oasis Home Owners Association. The disparity is not material. It is a not-for-gain company. At all material times, the applicant was

¹ Companies Act 28 of 2004.

Chairperson of the Board of Directors of the company while the respondent was an elected Director.

[5] The articles of association of the company provided for the procedures to be adopted for the removal of a director from office. In particular, the articles provide that a board member shall be deemed to have vacated office if he or she is removed from office in terms of s 228 of the Companies Act² or upon being convicted of any offence involving dishonesty.

[6] On or about 30 November 2019, the respondent sent out a written document to all board members of the company. The document was under cover of a letter. In the letter, the respondent formally submitted a 'motion of no confidence' against the applicant as chairperson of the Board. He wanted the applicant removed from office not only as chairperson, but as a director of the company as well, under the provisions of s 228 of the Companies Act.

[7] The written submission submitted under cover of the letter was some two and a half pages long. The written submissions did not refer to any alleged or proven conviction of the applicant for an offence involving dishonesty. It made four broad submissions under the following headings:

² Companies Act 28 of 2004.

- (a) Non-responsiveness to request for alternative consideration in respect of levy increase;
- (b) Deliberately withholding information from Home Owners;
- (c) Submission of written communication to Mr P de Beer, representing the concerned Home Owners of the Omeya Golf and Residential Oasis; and
- (d) Instructing and approving the withdrawal of funds for unintended purposes.

[8] The applicant formed the view that the two documents read together, made it clear that the respondent sought his removal from office on the basis that he, the applicant, had been convicted of an offence involving dishonesty. The allegations and the innuendo that he had been convicted of an offence involving dishonesty were not only scandalous but defamatory of him, he contended. The allegations were also false and were made maliciously and in bad faith, the applicant further argued.

[9] The applicant issued summons against the respondent claiming with costs, the sums of N\$500 000 as damages for an alleged injury to his good name and reputation and an additional N\$500 000 as patrimonial damages for the loss of business opportunities he suffered arising from the alleged defamation. The applicant also prayed for such alternative relief as the court would deem fit. In issuing summons as he did, the applicant firmly believed that the allegations against him were made in

circumstances that precluded the respondent from relying on the defence of privilege that he might otherwise have been entitled to.

[10] Maintaining that the letter and accompanying document were submitted in the execution of the respondent's duty to act in the best interests of the company, the respondent resisted the claim in its entirety and put the applicant to the proof of each and every material averment thereof.

[11] At trial the applicant gave evidence. He was his only witness. Upon closing his case, the respondent applied for an order granting absolution from the instance which the court granted on 25 February 2021 as stated above. In granting the decree of absolution from the instance, the court *a quo* formed the view that the applicant has failed to adduce any evidence that there was requisite publication of the material to persons outside the circle of persons to which it was intended.

[12] The applicant was dissatisfied with the judgment of the court *a quo* which he thought was replete with irregularities and errors. He gave the necessary instructions to his legal practitioners to impugn the judgment. In this regard, he firstly inquired from his legal advisors whether it was possible to appeal against the judgment to which he was advised he could not as the judgment lacked the requisite feature of being a final judgment. Instead, he was advised to have the judgment reviewed under the inherent power and jurisdiction of this Court as provided for under s 16 of the

Supreme Court Act.³ He thereafter and in the second instance, gave instructions for a request for such a review to be filed. This was duly done on 14 April 2021.

[13] On 14 May 2021, this Court issued an order refusing the request to invoke its review jurisdiction as provided for under s 16 of the Supreme Court Act aforesaid. The order, which was communicated to all the parties, was not accompanied by any reasons for the refusal of the request. It simply stated:

‘The request for the Supreme Court to invoke its review jurisdiction in terms of s 16 of the Supreme Court Act, 1990, is refused.’

[14] Whilst finding it difficult to accept that the doors of justice had been closed to him for all intents and purposes, the applicant nonetheless accepted the finality of the order of the Supreme Court of 14 May 2021. In this regard he, correctly in my view, accepted that it could not be impugned or further disputed.

[15] On 15 July 2021, the applicant received information that contrary to the advice that he had received earlier that the judgment *a quo* was not appealable, a judgment materially impacting on his case had been delivered in the Supreme Court. The Supreme Court had on that date delivered judgment in *Huang v Nevonga*⁴, a matter involving the granting of absolution by the High Court which the applicant in that matter argued ought not to have been granted. Instructions were then given for the

³ Supreme Court Act 15 of 1990.

⁴ *Huang v Nevonga* (SA 60-2019) [2021] NASC (15 July 2021).

filing of this application as stated above, with the application being filed on 29 July 2021.

The condonation application

[16] The applicant deposed to the founding affidavit filed in support of the application. In the founding affidavit, he, with much greater detail, narrates the facts giving rise to the application as summarised above. In addition to setting out the facts, the applicant further deposed that the initial advice from his legal practitioners that the order granting absolution from the instance is not appealable was erroneous but *bona fide*. Pointedly, it was his legal practitioners' belief that a judgment granting absolution is not appealable with or without leave.

[17] I pause here momentarily to note that none of the legal practitioners who formed the erroneous opinion that an order granting absolution from the instance is not appealable deposed to affidavits not only confirming the fact, but, also adducing evidence of the steps they took, if any, to ascertain the correct position of the law. Due to the absence of an affidavit before the court, counsel for the applicant had to adduce such evidence in the heads of argument filed for the applicant and from the Bar, much to the discomfort of the court. To his credit, he commendably and appropriately, owned up to the error. Ideally however, the information that he submitted should have been placed before the court by way of an affidavit with counsel rightfully being a witness in the matter.

[18] The applicant also contended in his founding affidavit that the respondent will not suffer prejudice if the late filing of the notice of appeal is condoned and the appeal is reinstated. Further, he also contended that no substantive rights of the respondent will be suspended pending the hearing of the appeal. Regarding the prospects of success, the applicant was of the view that it is apparent from his notice of appeal that his case 'enjoys strong prospects of success'. He did not see the need to highlight these 'strong' prospects of success in his founding affidavit. Still maintaining incongruously that the order *a quo* granting absolution was purely interlocutory, he deposed that the costs the respondent would be entitled to would in any event be capped in terms of rule 32 (11) of the Rules of the High Court as the respondent has not yet obtained an order entitling him to the costs of trial *a quo*.

[19] In opposing the application, the respondent deposed to an answering affidavit. In the main, the respondent deposed that while he takes note of the wrong advice given to the applicant by his legal representatives, it remained unexplained by the applicant why his legal representatives did not acquaint themselves with the correct position of the law. He argued that the applicant's legal representatives did not conduct thorough research on the correct legal position for had they done so, they would have found a number of decided cases that make the position trite that an order for absolution from the instance is appealable. It was the respondent's further contention that this court did not establish a new principle of law in *Huang v Nevonga* (*supra*). He further argued that it has been an established principle of Namibian law

for more than a hundred years that an appeal lies against an order granting absolution.

[20] In the replying affidavit, the applicant maintained that there was a reasonable explanation why his legal practitioners held the view that an order granting absolution from the instance is not appealable. In this regard, he sought reliance from the remarks of this Court in *Di Savino v Nedbank Namibia Ltd*⁵ as having formed the basis of the erroneous view.

[21] The oral submissions of both parties before the court were in the main based on the written heads of argument filed of record. It is not necessary that I repeat these.

The law

[22] The law regarding applications for condonation is trite. Its content is not in dispute in this application. What is in contention is whether or not the applicant has made out a good case for the indulgence sought. However, for purposes of this application, it is necessary to re-enforce the position at law that condonation is an indulgence granted in the discretion of the court. It is neither had for the mere asking nor is it a mere formality.⁶ The applicant is always required to satisfy the court that there is sufficient cause for his or her non-compliance with the rules.

⁵ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

⁶ See *Beukes and another v South West Africa Building Society and others* (SA 10-2006) [2010] NASC 14 (5 November 2010).

[23] The rules and practice of this Court require the applicant in the application for condonation, not only to fully explain the non-compliance with the rules but also to demonstrate that he or she enjoys prospects of success if the indulgence sought is granted. Whilst there is an interplay between the explanation tendered for the non-compliance with the rules and the prospects of success on appeal, there are instances where an application for condonation may be refused without advert to the prospects of success. These are all trite positions at law which guided the parties in their submissions before the court and which in turn will guide this judgment.

Analysis

[24] An explanation for failure to comply with rule 7(1) of the Rules of Court similar to the one in this application was described by Hoff JA in *Standard Bank Namibia Limited v Nekwaya*⁷ as ‘a weak and an unpalatable’ explanation. In that case, the applicant had similarly failed to timeously note an appeal against an order absolving the respondent from the instance because it misunderstood the law. The misunderstanding was based on erroneous legal advice received, making the applicant believe that the order granting absolution from the instance in the circumstances of that matter was not final and was therefore not appealable.

[25] Whilst *Standard Bank Namibia Limited v Nekwaya* (*supra*) turned on its own facts, it has not been argued before this court that the facts in that case are distinguishable from the facts of this application. They are not. Similarly, it has not

⁷ *Standard Bank Namibia Limited v Nekwaya* (SA 95-2020) [2022] NASC (1 December 2022).

been argued that there is a basis for viewing the explanation given by the applicant differently from the view expressed by Hoff JA in *Standard Bank Namibia Limited v Nekwaya*. I find no such basis. I therefore do not hold a different view to that held by this Court in *Standard Bank Namibia Limited v Nekwaya*.

[26] For the very cogent reasons given by Hoff JA, the explanation by the applicant is weak and unacceptable. It is expected that legal practitioners, simply by researching, can establish the correct position of the law. In this instance, an assumption appears to have been made on the position of the law. No research was conducted. Legal practitioners are not only expected to apply themselves with due diligence but to also keep abreast of the law. From their specialised training and qualifications, they are expected by both the courts and the public which they serve, to know the law and where they do not, to at least know where and how to find the law. To hold otherwise would be to negate the very basis upon which the legal profession is founded. I make this observation notwithstanding the detailed explanation given by counsel for the applicant as to how he came to entertain the wrong view of the law. The detailed explanation may have held sway if there was some uncertainty surrounding the point of law in this jurisdiction. As correctly submitted by the respondent, there is no uncertainty on the fact that an order granting absolution is appealable and there was no such uncertainty at the time that the applicant had to act. It is a settled position in this jurisdiction that an appeal lies as of right against an order granting absolution from the instance. This is so because such

an order is final in effect and has the effect of disposing of the entire claim before the court.

[27] For the avoidance of doubt, an order granting absolution from the instance is appealable as of right. It has been so appealable for the past one hundred years as correctly submitted by counsel for the respondent. The basis of the legal position was explained by Lord De Villiers CJ in *Steytler NO v Fitzgerald*⁸ 1911 AD 295 at 304 as follows:

'The test would be simplified and not be less sound if put in this way: Whether on the particular point in respect of which the order is made the final word has been spoken in the suit, or whether in the ordinary course of the same suit, the final word has still to be spoken. Take the case of absolution from the instance. It is classified by Voet (42, 1,5) among interlocutory sentences, but has the force of a definitive sentence in as much as by our practice the particular suit in which it has been pronounced is ended, and a fresh suit is necessary to enable the plaintiff again to proceed against the same defendant. It has accordingly been frequently held in our courts that a judgment of absolution from the instance may be appealed against . . . it would be different, however, where a Court refuses to grant absolution from the instance on the application of the defendant. Such a refusal is purely interlocutory and has not the effect of a definitive sentence inasmuch as the final word in that suit has still to be spoken. The court, having decided that the suit should take its ordinary course and not be put to an end by absolution the questions at issue remain open until final judgment.'

⁸ *Steytler NO v Fitzgerald* 1911 AD 295 at 304.

[28] The position of the law as pronounced above has been followed in this jurisdiction in the cases of *Kaese v Schacht & another*⁹ and *Stier & another v Henke*¹⁰ to mention but two of the reported authorities, which would have come to the aid of the applicant's legal team had some effort been made to research on the matter.

[29] Even assuming for argument's sake that the applicant was correct in believing that an order granting absolution from the instance is not final in effect as stated by Lord De Villiers CJ in *Steytler NO v Fitzgerald* cited above, the applicant did not follow through his belief by applying for leave to appeal against what he genuinely believed was a purely interlocutory order. When the question why this was not done was put to counsel during an engagement with the court, the record does not show that an appropriate answer was forthcoming.

[30] It is common cause that instead of applying for leave to appeal against the judgment and orders, the applicant took an alternative but erroneous route to have the judgment and orders *a quo* set aside. He requested for the proceedings to be reviewed in terms of s 16 of the Supreme Court Act. In this regard, he raised a number of alleged irregularities as having been attendant upon the hearing of the matter before the trial court. At the hearing of this application, he abandoned the alleged irregularities which he no longer wishes to pursue, even if he is granted leave to file his notice of appeal out of time.

⁹ *Kaese v Schacht & another* 2010 (1) NR 199 (SC).

¹⁰ *Stier & another v Henke* 2012 (1) NR 370 (SC).

[31] Not only did the applicant become aware of the correct position of the law by sheer chance and not through the industry or diligence of his advisors, but stripped to its bare essentials, the application for condonation is nothing other than a plea for the applicant to be allowed to impugn the judgment and orders *a quo* once again after the application for review was abortive. Put differently, the application for condonation is essentially an application for leave to have a second chance. Viewed in this light, it becomes unnecessary to advert to the prospects of success. The application fails at the first rung. The applicant cannot be allowed to once again attempt to impugn the judgment and orders *a quo* after he failed to do so using an alternative procedure which he took in *lieu* of an appeal. As was held by this Court in *Arangies t/a Auto Tech v Quick Build*¹¹ –

‘There are times for example, when 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”.’

[32] This application marks one of those times. The reason for the non-compliance with the rules is inexcusable. The applicant took a different route to an appeal without success. He is now pleading for an indulgence to have a second bite at the proverbial cherry.

[33] Regarding costs, I see no reason why these should not follow the event.

[34] I therefore make the following order:

¹¹ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5.

The application for condonation is dismissed with costs, such costs to include the costs for one instructing and one instructed legal practitioner.

MAKARAU AJA

MAINGA JA

ANGULA AJA

APPEARANCES:

Applicant:

TA Barnard

Instructed by Theunissen, Louw &
Partners

Respondent:

P Barnard

Instructed by De Beer Law Chambers