



NOT REPORTABLE

CASE NO: SA 14/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**SIMEON TUHAFENI NGHIPANDWA
EVELYNE NDAYOOKA NGHIPANDWA**

**First Appellant
Second Appellant**

and

**MARTIN S MWININGA N.O
ROLAND DESHENA N.O
PHILLIP MWANGALA N.O**

**First Respondent
Second Respondent
Third Respondent**

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 1 March 2023

Order: 1 March 2023

Reasons released: 14 March 2023

Summary: The High Court on 25 November 2020 entered judgment against the appellants. Unsatisfied with the order, the appellants filed their notice of appeal on 23 September 2021.

The notice of appeal was filed outside the time period as prescribed by the Supreme Court Rules. The appellants filed an application for condonation for the late filing of their appeal record and failure to furnish security for costs. Reinstatement of the appeals was not sought.

The purported application for condonation is not accompanied by a record and does not deal with the prospects of success. The appellants' explanation in support of the 'condonation application' is that they are lay persons and that it was difficult for them to comply with the rules on time. Furthermore, the appeal remains lapsed as no effort has been made to cure any of the non-compliances for which condonation is sought.

The appellants filed a 'withdrawal/removal' of the appeal and tendering wasted costs. The notice suggested that the appeal be removed for a period of six months.

Held that a postponement is not competent where an appeal had lapsed and had not been reinstated.

Held that in view of the serial non-compliances apparent on the record. The matter was struck from the roll with costs.

APPEAL REASONS

DAMASEB DCJ (MAINGA JA and HOFF JA concurring):

[1] On 1 March 2023, we gave an order in this matter in open court, striking the appeal from the roll, with costs and reasons to follow in due course. We have decided to give reasons for the order because the circumstances relating to this appeal are now all too common.

[2] It is settled jurisprudence of this Court that an appeal to it from a judgment and order of the High Court, is deemed to have lapsed, when:

- a) The notice of appeal is not lodged within 21 days of the judgment or order appealed against (Rule 7(1));
- b) The record is not lodged within the stipulated time of three months from the date of judgment or order appealed against (Rule 8(2)); or
- c) The appellant failed to furnish security (Rule 14(2)).

[3] All references to rules are to the Rules of the Supreme Court.

[4] In those circumstances, the suspension of any judgment or order of the court appealed from is considered lifted and the appeal is deemed to have been withdrawn¹.

[5] The present appeal falls foul of all these prescripts. On 25 November 2020 the High Court entered judgment against the appellant in the following terms:

- '1. Payment of the sum of N\$ 1 126 353.76.
2. Interest thereon at the rate of 10.50% (repo plus four) per annum as from 31 October 2019 until date of final payment.
3. Costs of suit on the scale as between attorney and client.
4. The matter is finalized and removed from the roll.'

¹ Rule 9(1)(b) of The Supreme Court Rules and *Andrews v Standard Bank Namibia Limited* (SA 90-2020) [2021] NASC (15 October 2021).

[6] In the notice of appeal the appellants state that judgment was granted by the High Court on 25 November 2020. Therefore, if they wished to appeal against that order, they should have filed a notice of appeal on 17 December 2020 and would have complied with rule 7(3)(c)(ii).² The notice of appeal was only filed on 23 September 2021 and it did not comply with rule 7(3)(c)(ii).

[7] To the above transgressions are to be added the following non-compliances: the record was not lodged and no security was furnished.

[8] What is before us now is an inept application for condonation which seeks the following relief:

‘1. Condoning the Appellants’ non-compliance with Rule 7(1) of the Rules of this Honourable Court with regard to the time period prescribed therein for lodging of the notice of appeal against the entire proceedings in the High Court under Case NO: HC-MD-CIV-ACT-CON-2020/02556, in terms of Supreme Court Rules of 15 November 2017;

2. Condoning the Appellants’ non-compliance with Rule 8(1) of the Rules of this Honourable Court with regard to the time period prescribed therein for lodging of the copies of the record of the entire proceedings in the High Court under Case No: HC-MD-CIV-ACT-CON-2020/02556, in terms of Supreme Court Rules of 15 November 2017;

3. Condoning the Appellants’ non-compliance with Rule 14(1) of the Rules of this Honourable Court with regard to the time period prescribed therein for lodging of the

²7 (3) The notice of appeal referred to in sub rule (1) must -

(a) . . .

(b) . . .

(c) set forth concisely and distinctly -

(i) in the grounds referred in subparagraph (i), in separate numbered paragraphs, the findings of fact and conclusions of law to which the appellant objects and the particular respects in which the variation of the judgment or order is sought’.

security of costs of the entire proceedings in the High Court under Case No: HG-MD-CIV-ACT-CON-2020/02556, in terms of Supreme Court Rules of 15 November 2017; 4. Ordering the Respondent to pay the costs in disbursements of this Application, only in the event of it opposing this Application.'

[9] The condonation application is inept because to date no effort has been made to cure any of the non-compliances for which condonation is sought. In other words, the appeal remains lapsed on any of the bases that I have set out previously.

[10] As I have already stated, the purported application for condonation is not accompanied by a record and – unsurprisingly – does not deal with the prospects of success. The appellants' explanation in support of the 'condonation application' is that they are lay persons and that it was difficult for them to comply with the rules on time.

[11] Because of the absence of a record we are not in a position to ourselves assess – given that the appellants are unrepresented – whether the proceedings *a quo* are tainted by any irregularity or that the order being impugned suffers from any legally cognizable defect.

[12] When the matter was called on 1 March 2023, Mr Muhongo rose on behalf of the respondents and placed on record that his instructing legal practitioner had that morning received a filing from the appellants, purporting to be a 'notice of withdrawal/removal' of the appeal and tendering wasted costs. It is suggested in that notice that the appeal be removed for a period of six months. The only logical

inference from the request is that the appeal be postponed. Now, a postponement is not competent where an appeal had lapsed and had not been reinstated.

[13] We were satisfied that striking the matter was the only competent order because of the absence the record of proceedings *a quo*, there was no appeal before us which could be 'removed' or 'withdrawn'.

[14] In view of the serial non-compliances apparent on the record, Mr Muhongo accepted that an appropriate order in the circumstances would be for the matter to be struck from the roll, with costs. Accordingly, we made such an order. In the withdrawal of the appeal, the appellants tendered costs as placed on record by Mr Muhongo. We therefore saw no reason why costs should not be granted in favour of the respondents.

DAMASEB DCJ

MAINGA JA

HOFF JA

APPEARANCES

APPELLANTS:

No appearance

RESPONDENTS:

T Muhongo

Instructed by Fisher, Quarmby & Pfeifer