



**REPORTABLE**

CASE NO: SA 56/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ALEX KAMWI MABUKU KAMWI**

**Applicant**

and

**LAW SOCIETY OF NAMIBIA**

**Respondent**

CASE NO: SA 43/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ALEX KAMWI MABUKU KAMWI**

**Applicant**

and

**PROSECUTOR-GENERAL OF NAMIBIA**

**First Respondent**

**THE MAGISTRATE OF KATUTURA  
MAGISTRATE'S COURT**

**Second Respondent**

CASE NO. SA 44/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ALEX KAMWI MABUKU KAMWI**

**Applicant**

and

**LAW SOCIETY OF NAMIBIA  
MARGARETHA STEINMANN**

**First Respondent  
Second Respondent**

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

**Heard:** 15 March 2023

**Delivered:** 10 October 2023

**Summary:** These matters are consolidated applications for condonation for the late filing of the record of proceedings in the High Court involving the same applicant. The applications were heard together on the same day, hence this composite judgment covering all three of them. When informed by this Court's registrar that his appeals were deemed to have been withdrawn on account of the failure to file the appeal records and to provide security for the respondents' costs, the applicant insisted that he was only required to file the records once the issue of security had been resolved. He argued that as his applications to be released from the obligation to provide security were still pending, he was not obliged to file the appeal records.

The applicant later filed applications for condonation for the failure to file the appeal records. In his applications, he repeated the assertion that he was only required to file the records once the matter of security had been decided.

To resolve the impasse created by the competing contentions, the applications for condonation were set down for argument.

*Held that*, the interpretation contended for by the applicant that security for costs must first be furnished prior to attending to the preparation of the record is untenable.

*Held that*, rule 8 not only requires that an appellant must file the record within three months of the date of the judgment appealed against or within such further period as may be agreed upon in writing by the respondent, but rule 9(4) spells out sanctions for non-compliance with rule 8.

*Held that*, the absence of the record of proceedings also impedes on the administration of justice, in that it hinders the court's ability to determine the prospects of success on appeal as the relevant evidence or material is not placed before it.

*Held that*, in view of the applicant's non-compliance with multiple rules of court, this is an instance where, due to the cumulative effect of glaring, flagrant and inexplicable non-compliances with the rules of court, condonation should be refused without considering the merits. Applications dismissed.

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**APPEAL JUDGMENT**

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SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

## Introduction

[1] These consolidated matters involve the same applicant in three separate applications for condonation for the late filing of appeal records – and in respect of two of those applications – the reinstatement of lapsed appeals noted in this Court. As the contentions and issues material to the determination of the applications are similar, the matters were set down for hearing together and were heard on the same day. It is for those reasons that one composite judgment covering all the three applications has been prepared. It remains now to briefly sketch the history of the applications and the context in which they came to be argued.

## Background

*Alex Kamwi Mabuku Kamwi v Law Society of Namibia Case SA 56/2020*

[2] In this case, the applicant timeously lodged an appeal on 22 July 2020, against his conviction for contempt of court in the High Court. On 22 October 2020, he was informed by the registrar that his appeal was deemed to have been withdrawn as contemplated under rule 9 by reason of the failure to file the record of proceedings in the High Court in accordance with rule 8(2)(b) of the Rules of Court and for the failure to furnish security in terms of rule 14.

[3] On 2 November 2020, the applicant filed an application for condonation for the late filing of the record. He, however, did not address the issue of security for the respondent's costs on appeal. Also, he did not seek an order reinstating the lapsed appeal in this application. In his affidavit supporting the application, the applicant stated that the record was not filed because rule 14(2) required of an appellant to

furnish security before filing the appeal record unless the respondent had waived his or her right to security or the court appealed from had released an appellant from such obligation. According to the applicant, rule 14 suspends the filing of the record until the issue of security for costs has been resolved. As the issue of security had not been resolved at the time he filed the application for condonation, he was not required to file the appeal record.

[4] As regards the provision of security for the respondent's costs, the applicant stated that the respondent was requested to waive its right to security but the request was declined. He noted further that he had filed an application in the court a quo to be absolved from the obligation to provide security. He claimed that the delay in lodging the appeal record was not intentional but that he was simply following the provisions of rule 14.

[5] On 26 April 2021, the applicant filed an amended notice of appeal in the same matter. A further amended notice of appeal was filed on 3 June 2022. Nine days before the hearing of the applications on 1 March 2023, the applicant filed a record of the proceedings in the High Court with the registrar of this Court. A document titled 'Argument: Application for condonation and reinstatement of the appeal' was filed together with the record. In this document, the applicant repeated his contention that he was only required by rule 14 to file the appeal record after security had been furnished or if released from such obligation by the court appealed from.

[6] Despite the timeous serving of the notice of set down on it, the respondent filed a condonation application for the late filing of the notice to oppose the appeal as well

as the late filing of the heads of argument only on the day of the hearing. No power of attorney was filed on behalf of the respondent. After considering the submissions made by counsel and the applicant, the court informed counsel that the failure to file a power of attorney could not be condoned and as such, the respondent would not be allowed further representation in the proceedings. The applicant's condonation application in this case thus remained unopposed.

*Alex Kamwi Mabuku Kamwi v Prosecutor-General of Namibia & another* Case SA 43/2021

[7] In this matter, the applicant instituted proceedings in the High Court seeking an order for the permanent stay of his prosecution in the regional court on the offence of practising or holding himself out as or pretending to be a legal practitioner in contravention of s 21 of the Legal Practitioners Act 15 of 1995 (as amended). The application for the permanent stay of his prosecution was heard on 6 October 2020 and dismissed on 7 May 2021.

[8] The applicant then noted an appeal to this Court on 28 May 2021. By letter dated 10 March 2022, the registrar informed the applicant that his appeal was deemed to have been withdrawn by reason of the failure to file the record of proceedings in the High Court in accordance with rule 8(2)(b) and for the failure to furnish security in terms of rule 14.

[9] On 11 August 2021, the applicant filed a condonation application for the late filing of the appeal record. In the affidavit supporting his application, he repeated the

argument that he was only required to file the appeal record after the issue of security for the respondents' costs had been resolved. He again took issue with the contentions, contrary to his, advanced in the registrar's letter. This application is opposed.

[10] On 2 May 2022, the applicant addressed a letter to the Chief Justice in which he recorded his disagreement with the legal contentions made in the registrar's letter. The applicant asserted that his appeal could not have lapsed because rule 14 only required of him to file the record of proceedings after security for costs had been furnished and not at any stage before that.

*Alex Kamwi Mabuku Kamwi v Law Society of Namibia & another Case SA 44/2021*

[11] In this case, the applicant lodged an appeal against the decision of the High Court dismissing a rescission application brought by him against the setting aside of his amended particulars of claim.

[12] On 11 August 2021, the applicant filed a condonation application for the late filing of the appeal record. In this application, the applicant repeated the contention he made in Case SA 43/2021 above that rule 14 required of an appellant to file the record of appeal only after – and not before – he or she had entered into good and sufficient security for a respondent's costs on appeal or had been released from such an obligation.

[13] On 13 December 2021, he was informed by the registrar of this Court that the appeal noted on 28 May 2020 was, in terms of rule 9 of the court's rules, deemed to have been withdrawn due to his failure to comply with rule 8 and rule 14.

[14] The applicant replied to the registrar's letter in a letter dated 12 January 2022, addressed to the Chief Justice, contending that his appeal had not lapsed due to the non-compliances with the rules of court stipulated in the registrar's letter. The applicant argued furthermore that his appeal could not have lapsed because rule 14 suspends the filing of the record of proceedings until the issue relating to the provision of security was resolved. This application is also opposed.

[15] Upon consideration of the content of the applicant's letters, I directed that the applications be set down for argument so that the competing contentions made by the applicant and the registrar can be adjudicated upon, in a way, to break the deadlock. It is in this limited context that these matters were set down for argument. The parties were directed to file heads of argument on the interpretation of rule 14 contended for by the applicant.

#### Attitude of the respondents to the applications for condonation

[16] The two counsel who separately argued the matters were *ad idem* that an application brought in terms of rule 14(2)(b) for release from the obligation to furnish security for costs does not absolve an applicant from complying with rule 8. Counsel argued that the interpretation and construction of rule 14 read with rule 8 contended



for by the applicant is misplaced. In support of this proposition, counsel referred us to *Shikongo v Lee's Investments*<sup>1</sup> where a similar argument was rejected.

[17] Counsel, correctly, also highlighted the applicant's non-compliance with multiple other rules of court, including the failure to file an appeal record compliant with rule 11(1); the failure to hold meetings with the respondents or their legal practitioners to agree on the content of the record in violation of rule 11(10); the failure to properly index and paginate the records as set out in rule 17(7); the failure to file heads of argument within the period stipulated in rule 17(1), and his reliance on foreign authorities without certifying that no Namibian authority existed in support of propositions of law he advanced as required by rule 19.

#### Principles governing condonation applications

[18] The general principles applied in the determination of applications for condonation are well-established. They have been comprehensively discussed in numerous judgments of this Court<sup>2</sup> and it serves no useful purpose to restate them in any detail here.

[19] As repeatedly stated, condonation for the non-compliance with a rule of the Rules of Court is by no means a mere formality. It is for the applicant to satisfy the Court that sufficient cause exists for excusing him or her from the non-compliance.

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<sup>1</sup> *Shikongo & another v Lee's Investment (Pty) Ltd* 2022 (4) NR 1171 (SC).

<sup>2</sup> Such as *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) paras 2-3 and more recently in *Namrights Inc v Government of Namibia & 18 others* (SA 87-2019) [2023] NASC (28 April 2023).

The applicant is required, in the first place, to provide a reasonable and acceptable explanation for the non-compliance and secondly, to satisfy the Court that there are reasonable prospects of success on appeal.

[20] It is also now trite that an application for condonation may be dismissed without considering the prospects of success on appeal where there is no reasonable and acceptable explanation for a glaring or flagrant non-compliance with the rules.<sup>3</sup>

#### Analysis and determination

[21] Regarding the late filing of the record, it can be recalled that the applicant in all three matters maintained that rule 14 of this Court's rules required an appellant to file the record of proceedings only after the issue relating to the respondent's costs on appeal had been resolved. The interpretation contended for by the applicant that security for costs must first be furnished prior to attending to the preparation of the record is untenable.

[22] Rule 8(1) requires that after an appeal has been noted, the appellant *must*, subject to any direction issued by the Chief Justice, file four copies of the record of the proceedings with the registrar and deliver such number of copies of the record to the respondent as may be considered necessary. Subrule (2)(b) provides that the record must be filed, in all cases, within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required, within three

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<sup>3</sup> *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 (6 July 2016) and more recently in *De Klerk v Penderis NO* (SA 76-2020) [2023] NASC (1 March 2023).

months of an order granting leave to appeal; or within such further period as may be agreed to in writing by the respondent. In the present matters, it is common cause that the respondents were not approached to grant consent and therefore no such consent was obtained.

[23] Rule 8 not only requires that an appellant must file the record within three months from the date of the judgment appealed against or within such further period as may be agreed upon in writing by the respondent, but rule 9(4) spells out sanctions for non-compliance with rule 8. These are that if an appellant or a respondent (in the event of a cross-appeal) fails to lodge the record within the period prescribed in rule 8(2); has not applied to the respondent for consent to an extension; and has not given notice to the registrar that he or she has so applied, then the appeal is deemed to have been withdrawn and the suspension of any judgment or order of the court appealed from is considered lifted.

[24] The absence of the record of proceedings also impedes on the administration of justice, in that it hinders the court's ability to determine the prospects of success on appeal as the relevant evidence or material is not placed before it.

[25] In any event, the interpretation contended for by the applicant has already been rejected by this Court in *Shikongo & another v Lee's Investment*. In para 95, the court in *Shikongo* held that if the contention such as that advanced by the applicant is to be accepted, it would result in a complete distortion of the rule, in that an appellant would claim to be entitled to prepare the record of proceedings for filing outside the

three months of the date of the judgment or order appealed against set out in the rule. This is clearly not what the rule means and any attempt to subvert its true meaning must be resisted.

[26] As regards the late filing of the heads of argument, the explanation is that rule 17(1) provides that an applicant is required to file heads of argument, not more than 21 days before the hearing of the matter. The applicant argued that he understood the rule to mean that heads of argument can be filed at any stage, even a day before the date of hearing.

[27] This Court in *Metropolitan Bank of Zimbabwe Ltd v Bank of Namibia*,<sup>4</sup> para 11, held that rule 17, as understood by legal practitioners and applied by this Court, has always been that an appellant's heads of argument must be filed no later than 21 days before the date of the hearing and a respondent's heads are to be filed no later than 10 days before the hearing. This is the true import and scope of the rule and the argument by the applicant that he could file his heads of argument even a day before the hearing of an appeal is clearly wrong as such practice would severely prejudice the court and a party in the preparation of an appeal and cannot therefore be countenanced. It follows that the applicant has not given a satisfactory and acceptable explanation for the failure to comply with the rules of court.

[28] In light of the applicant's non-compliance with multiple rules of court, including those highlighted by the respondents, I am of the considered view that this is one of

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<sup>4</sup> *Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia* 2018 (4) NR 1115 (SC).

those instances where, due to the cumulative effect of glaring, flagrant and inexplicable non-compliances with the Rules of Court, condonation should be refused without considering the merits. It follows that the applications must be dismissed. What remains is to determine the issue of costs.

### Costs

[29] An aggrieved party to litigation is entitled to approach a court for redress. However, such decision has cost implications on both sides, but more so on a respondent, especially in an appeal such as the present matters where the appeals are anchored on shaky grounds. It is for a good reason that an appellant is required by the Rules of Court to enter into good and sufficient security for a respondent's costs of appeal, unless the appellant has been released from that obligation by virtue of the provisions of rule 14(2).

[30] During oral argument, the applicant informed the Court that the present matters were very important to him. He thus urged that no cost order be made against him should his applications fail as he is a pensioner.

[31] As mentioned already, the application for condonation and reinstatement under Case 56/2020 is unopposed. Consequently, no order as to costs in that matter will be made. The respondents in Case SA 43/2021 and Case SA 44/2021 have requested for cost orders should the applications be dismissed. In respect of Case SA 43/2021, we were informed by the applicant that the application for his possible release from the obligation to provide security for the respondents' costs was pending in the High

Court and that in respect of Case SA 44/2021, a similar application was decided against him on 23 February 2023. The applicant made application from the Bar for this Court to release him from the obligation to provide security in Case SA 56/2020 and Case SA 44/2021.

[32] He relies for this application on *Kamwi v Duvenhage*,<sup>5</sup> which he says is authority for the proposition that an application for release from the obligation to provide security for the respondents' costs of appeal can be made from the Bar. We reserved judgment on this application. What follows is our ruling. The application cannot be granted. First, *Kamwi v Duvenhage* is no authority for the proposition the applicant contends for. Second, rule 14(2) requires that such an application is to be made in the court appealed from, upon application delivered within 15 days after delivery of the appellant's notice of appeal. It is not a type of application that can be made from the Bar, let alone in the Supreme Court. For these reasons the applicant's application is refused.

[33] The general rule is that costs follow the event. The applicant carried on with the proceedings in this Court without paying due regard to the rule regulating the important issue of provision for the respondents' costs on appeal, even in an instance where the application to be released from that obligation failed in the court below. In those circumstances, there is no justification to depart from the general rule that costs follow the event.

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<sup>5</sup> *Kamwi v Duvenhage* 2008 (2) NR 656 (SC).

Order

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

- (a) The applications for condonation for the late filing of the record of proceedings in the High Court in the lapsed appeals under Case SA 56/2020, Case SA 43/2021 and Case SA 44/2021 are dismissed.
- (b) The applications for the applicant's release from the obligation to enter into good and sufficient security for the respondents' costs of appeal in Case SA 56/2020 and Case SA 44/2021 is refused.
- (c) No order as to costs under Case SA 56/2020 is made.
- (d) The applicant is ordered to pay the respondents' costs under Case SA 43/2021 and Case SA 44/2021. In respect of Case 44/2021, such costs to include the costs of one instructed and one instructing legal practitioner.

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**SHIVUTE CJ**

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**SMUTS JA**

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**FRANK AJA**

APPEARANCES:

In Case SA 56/2020

APPLICANT: In Person

RESPONDENT: Unopposed

In Case SA 43/2021

APPLICANT: In Person

RESPONDENTS: J Ncube  
The Government Attorney

In Case SA 44/2021

APPLICANT: In Person

RESPONDENTS: H Garbers-Kirsten  
Instructed by Köpplinger Boltman Legal  
Practitioners