



NOT REPORTABLE
CASE NO: SA 87/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PETRUS MUREMI NAMBUNDU	First
Appellant	
SELMA NELAO ALPHEUS	Second
Appellant	
MARTIN MARTINO	Third Appellant
GUSTAV A GARISEB	Fourth Appellant
MASONDE VIWANGU	Fifth
Appellant	
BASILIUUM KAGUWO	Sixth
Appellant	
JOHANNES KANYANGA NDYAMBA	Seventh
Appellant	
CHRISTOLINE KAMBAMBA	Eighth Appellant
SELONIKA UPINGASANA	Ninth Appellant
BERNHARD HIKUMUA	Tenth
Appellant	
FILLIP LOUIS	Eleventh
Appellant	
FILLIPINE GOMUSAS	Twelfth Appellant
IMMANUEL KATIVA SHILONDA	Thirteenth
Appellant	
EFAT PEJAMATJIKE	Fourteenth
Appellant	

HELARIUS GOSBEB	Fifteenth
Appellant	
ANDREAS NDIMBA THIMBUNGA	Sixteenth
Appellant	
MARTINO MBIMBI	Seventeenth
Appellant	
SARA HASEB	Eighteenth
Appellant	

and

ENDOBO PROPERTIES CC	Respondent
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Coram: DAMASEB DCJ, MAINGA JA and UEITELE AJA
Heard: 6 June 2023
Delivered: 2 August 2023

Summary: The respondent is Endobo Properties CC, which is the registered owner of a certain immovable property known as Portion 64 (a Portion of Portion B) of the Farm Town of Tsumeb, No. 103 in the Registration Division 'B', Oshikoto Region. The appellants are individuals who reside on the property. Between the period 2003 and 2017 the appellants, on separate occasions and acting individually and the respondent, entered into separate written lease agreements in respect of their respective units that are situated on the property.

The respondent, alleging that the appellants breached the lease agreements, on 10 September 2018 instituted proceedings in the High Court seeking an order confirming its cancellation of the respective lease agreements and the eviction of the appellants from the respective units they occupy and from the property. The appellants disputed the respondent's ownership of the property. The action was then set down for hearing in the High Court from 11 to 19 May 2020.

The High Court, on 20 September 2020 found for the respondent and confirmed the respondent's cancellation of the respective lease agreements concluded between the appellants and the respondent. In addition to confirming the cancellation of the lease agreements, the court ordered the eviction of the appellants and all persons holding under them from the respective units and from the property. The appellants were ordered to vacate the property on or before 30 September 2020.

The appellants, aggrieved by the judgment and orders of the High Court, on 25 September 2020 filed a notice to appeal. At the time when the appellants filed the notice of appeal, they were legally represented. The appellants, however, only lodged the appeal record on 6 May 2021. On 13 January 2021, the appellant's legal practitioner withdrew as legal practitioner for the appellants, thus leaving the appellants unrepresented. On 24 February 2021, the Registrar of the Supreme Court addressed a letter to the first appellant informing him of the various non-compliances with the rules of this Court. On 1 September 2021, the appellants filed their application for condonation for their non-compliances with the rules of court.

On 16 December 2022, the registrar of this Court informed the parties that the hearing of the application for condonation and, if necessary, the hearing of the appeal on the merits was set down for 6 April 2023. On that day, the appellants appeared before court for purposes of the hearing and had nominated four of the 18 appellants to speak on their behalf. However, it became apparent that the four appellants who were designated to speak on behalf of the other 14 appellants were not conversant with the English language and could thus not follow the proceedings, neither could the court make out what they were saying. The court thus accordingly postponed the proceedings to 6 June 2023 to secure interpreters.

On 2 June 2023, the appellants filed additional documents in support of their condonation application. When the matter appeared on 6 June 2023, the court enquired from the appellants what exactly they were seeking from court. Their response, in a nutshell, was that they seek a postponement of the matter to secure funding for legal representation. The respondent opposed the application for postponement on the basis that the appellants' application is an unnecessary delay and attempt to avoid their eviction from the property and that it has the right to have

the matter finalised owing to the nature of the relief sought as well as the history of the matter.

Held that, an application for postponement of a hearing cannot be claimed as of right, the court must be satisfied that it is in the interests of justice to postpone. The court will not grant postponement simply because parties agree to it, good cause has to be shown.

Held further that, the granting of a postponement is in the discretion of the court, which discretion must be exercised judicially and not capriciously or upon any wrong principle, but for substantial reasons. The relevant factors were set out.

Held furthermore that, the interests of justice is not only the interests of the parties themselves but also public interest. The appellants' application for postponement in respect of their application for condonation of their con-compliance with the rules of this Court is refused.

The appeal is struck from the roll.

There is no order as to costs.

APPEAL JUDGMENT

UEITELE AJA (DAMASEB DCJ and MAINGA JA concurring):

Introduction

[1] The respondent, Endobo Properties CC, a close corporation incorporated in accordance with the Close Corporations Act 26 of 1988 is the registered owner of a certain immovable property known as Portion 64 (a Portion of Portion B) of the Farm Town of Tsumeb, No. 103 in the Registration Division 'B', Oshikoto Region (herein 'the property'). The appellants are individuals who reside on the property. In their plea, in the court *a quo*, the appellants disputed the respondent's ownership of the property.

[2] Between the period 2003 and 2017 the appellants, on separate occasions and acting individually and the respondent, entered into separate written lease agreements in respect of their respective units that are situated on the property. The respondent, alleging that the appellants breached the lease agreements, on 10 September 2018, commenced proceedings in the High Court seeking an order confirming its cancellation of the respective lease agreements and the eviction of the appellants from the respective units they occupy and from the property.

[3] The action was set down for hearing in the High Court from 11 – 19 May 2020. The High Court, after hearing evidence and legal arguments during May 2020, on 20 September 2020 found for the respondent and confirmed the respondent's cancellation of the respective lease agreements concluded between the appellants and the respondent. In addition to confirming the cancellation of the lease agreements, the court ordered the eviction of the appellants and all persons holding under them from the respective units and from the property. The appellants were ordered to vacate the property on or before 30 September 2020. If they failed to so vacate the property then and in that event, the deputy sheriff for the district of Tsumeb was authorized and directed to evict the appellants and all persons holding under them from the property.

[4] The appellants were aggrieved by the judgment and orders of the High Court and promptly on 25 September 2020 filed a notice to appeal against the High Court's judgment and orders. The appellants, however, only lodged the appeal record on 6 May 2021.¹ At the time when the appellants filed the notice of appeal, they were

¹ The record was filed approximately five months out of time. Rule 8 (2)(b) requires the record to be filed within three months of the date of the judgment or order appealed against or, in cases where

represented by a firm of legal practitioners based in Windhoek. On 13 January 2021, the appellant's legal practitioner withdrew as legal practitioners for the appellants, thus leaving the appellants unrepresented.

[5] On 24 February 2021, the registrar of this Court addressed a letter to the first appellant informing him of the various non-compliances with the rules of this Court. The first appellant was also informed that the appeal was, in view of the multiple non-compliances with the rules of this Court, deemed to have been withdrawn.

[6] On 8 March 2021 a document titled '*AFFIDAVIT FOR CONDONATION OF NON-COMPLIANCE WITH RULES OF THE SUPREME COURT*' was filed on behalf of the appellants. The affidavit was deposed to by the appellants' former legal practitioner. In the affidavit, the deponent prayed for this Court to condone the appellants' non-compliance with rules 8 and 14 of the Supreme Court Rules. On 1 September 2021, the appellants filed their application for condonation for their non-compliance with the rules of court.

[7] On 6 December 2022, the registrar of this Court informed the parties that the hearing of the application the condonation of the appellants' non-compliance with the rules of this Court and, if necessary, the hearing of the appeal on the merits was set down for 6 April 2023. On that day, the appellants appeared before court for purposes of the hearing. The appellants had nominated four of the 18 appellants to speak on their behalf. At the hearing of 6 April 2023, it became apparent that the four appellants who were designated to speak on behalf of the other 14 appellants were not conversant with the English language and could thus not follow the proceedings, neither could the court make out what they were saying. The court thus accordingly

leave to appeal is required, within three months after an order granting the leave to appeal.

postponed the proceedings to 6 June 2023 and instructed the registrar to secure interpreters for the appellants.

[8] On Friday, 2 June 2023 at approximately 15h24, the appellants filed a document titled '*DOCUMENTS TO BE USED IN THE APPLICATION FOR CONDONATION*' but this document only found its way to the presiding judicial officers on Tuesday morning 6 June 2023, shortly before the hearing commenced. In that document, a certain Mr Phillip Louis, who is the eleventh appellant, amongst other statements, states that (quoted verbatim):

'3 We the appellants have filled documents in support of the application for condonation and challenges we faced financially in securing a legal counsel to come to to our aid.

4 Our last appearance we have stated to this Honourable Court that we have approach various institutions and individuals to assist us financially. We are delighted to report that we have sought assisted in their response they have agreed but indicated the short period and securing funds will be available and attend this proceedings. We also want to alert this Honourable Court that some funds has been secure but it has to be in compliance with certain legislations requirement that need to be meet.

5 . . .

PROCESS OF SECURING LEGAL PRESENTATION

After our last adjournment, we, the appellants have gone to the great length to sought the services of Legal Counsel.

We also obliged to report to this Honorable Court that we have in the process contacted various sponsor internal and abroad. With regard to the internal sponsor we were unable to get funding for our legal bill . . .

Our position is that we obtain some legal counsel in South Africa, currently P J Sauls and our correspondence between them and us is evident that they are willing to come and assist us. This can only be done once the money is paid. (See the attached letter of correspondence dated).

FINANCING THIS APPEAL

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APPLICATION FOR POSTPONMENT

We therefore apply to this Honourable Court for postponement in order to secure the legal practitioner and South African senior counsel.

The reason why we could not secure to be represented with legal counsel from South Africa, they need all supporting documentations. . . .' (sic)

[9] At the hearing, the court enquired from the four spokespersons for the appellants what exactly they were seeking from court. Their response was that they want a postponement of the matter, if possible, to next year (that is to the 2024 sessions of the Supreme Court), so that the funds that they have allegedly secured be, after all the exchange control requirements have been complied with, paid over to them to enable them to secure legal representation.

[10] The respondent opposed the application for postponement, citing as reasons for its opposition that the appellants' application is an unnecessary delay and attempt to avoid the obvious, namely their eviction from the property. They further cited their right to have the matter finalised owing to the nature of the relief sought and the history of the matter as a ground to object to any postponement. Before I consider the appellants' application for postponement, I will briefly set out the legal principles relating to postponements.

The legal principles governing application for postponement

[11] This Court in *Myburgh Transport v Botha t/a SA Truck Bodies*² sets out the principles governing applications for postponement. Although the principles outlined in *Myburgh Transport* were articulated with regard to a trial court, those principles apply equally to an appeal court. I will briefly summarise the principles in the next paragraphs.

[12] It is a well-established principle of our law that postponements are not there for the mere asking. Where a party seeks an indulgence of the court, he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interests of justice to have the matter finalised. This means, the party seeking postponement must proffer good and strong reasons why he or she seeks a postponement and that the applicant (for a postponement) must give full and satisfactory explanation of the circumstances that give rise to the application.

[13] The application itself must be *bona fide* and must not be used as a tactical endeavour to obtain an advantage to which the applicant is not entitled. A court considering an application for postponement is entrusted with a discretion as to whether to grant or refuse a postponement. The guiding principle is that in granting or refusing a postponement, the court must exercise its discretion judicially after considering what is fair and just to both parties and balancing the interests of justice. The discretion must not be exercised capriciously or upon any wrong principle, but for substantial reasons.

² *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC) at 174.

[14] In exercising its discretion, a court must consider whether the application was made timeously, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors must be weighed to determine whether it is in the interests of justice to grant the postponement. The Constitutional Court of South Africa has added to the mix and stated that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.³

Discussion

[15] In the present case, the appellants' erstwhile legal practitioners on 13 January 2021 gave notice to the appellants that he is withdrawing as the appellants' legal practitioner. It thus follows that from January 2021 to 6 April 2023 the appellants knew that they had no legal representation. In addition, this Court on 6 April 2023 postponed the hearing of the matter to 6 June 2023 to enable the court to secure interpreters for the appellants.

[16] Despite the fact that the appellants knew since April 2023 that the application for condonation is set down for hearing on 6 June 2023, the appellants have not explained why it took them up to 2 June 2023 to launch the application for condonation. In addition, the appellants' application for condonation lacks details of where the appellants allegedly secured the funds, the details of the legal practitioner

³ *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) para 4 and *Lekolwane v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 17.

and the 'South African senior counsel' they want to represent them. The explanation is thus wholly unsatisfactory.

[17] On the other hand, Mr Dicks who appeared for the respondent vehemently objected to a postponement. He argued that this matter is a classic example of a tactical manoeuvre for purposes of obtaining an advantage to which the appellants are not legitimately entitled to, namely delaying their eviction from the property.

[18] Having considered the time within which the application for postponement was made, the explanation proffered for the postponement, the prejudice that will be occasioned to the appellants and the respondent, the fact that the application is opposed, and the interest of the respondent in having the matter finalised, I cannot find that it is in the best interests of justice or in the interest of the broader public that this matter be further postponed. To the contrary, I find that it is in the interests of justice that this matter be finalised. Broader interests of the public require that the matter proceeds as it was properly enrolled in accordance with the rules of this Court.

Conclusion

[19] The appellants' application for condonation for their non-compliance with the rules of this Court was to be considered as the first order of business on the set down date of 6 April 2023. The matter was, however, postponed to 6 June 2023 to enable the applicants to secure the services of interpreters. On 6 June 2023, it became apparent that the appellants still have not filed their heads of arguments, provided security as contemplated in rule 14 or filed a rule 8 compliant record.

[20] Both on 6 April 2023 and on 6 June 2023, the condonation application was not considered. A condonation application is a condition precedent to revive a lapsed or withdrawn appeal. It means that until condonation is granted there is no appeal before this Court.⁴

Costs

[21] The general rule is that costs follow the cause. A secondary general rule is that costs are in the discretion of the court. Taking into consideration the conditions under which the appellants live on the property, and also how they have spent their meagre resources on this matter, I am of the view that it will not be just and fair to burden them with costs in this matter in such circumstances.

Order

[22] For the reasons set out in this judgment, I make the following order.

1. The application for postponement of the application for the condonation of the appellants' non-compliance with the rules of this court is refused.
2. The application for condonation of the appellants' non-compliance with the rules of this Court is struck from the roll.
3. No order as to costs.

⁴ *Alexia Properties CC v De Sousa* 2021 (3) NR 686 (SC).

UEITELE AJA

DAMASEB DCJ

MAINGA JA

APPEARANCES

APPELLANTS: B Kaguwo (with him A Thimbunga, F Louis and M
Martino)

In person

RESPONDENT: G Dicks
Instructed by Francois Erasmus & Partners.