SUMMARY **A**
194/2005

HEINER SCHWEIGER versus GAMIKAUB (PTY) LTD

MULLER, AJ

11/11/2005

CIVIL PROCEDURE - LEAVE TO APPEAL

- Application for condonation for late filing of application for leave to appeal and for leave to appeal
- Leave to appeal still required in respect of cost order.
- Requirements for condonation, namely, acceptable explanation and prospect of success.
- Failure of providing acceptable explanation, not necessary to consider second requirement.
- Obligation of legal representative to know and apply the Rules of Court.
- Condonation refused and application for leave to appeal dismissed.

CASE NO. A 194/2005

IN THE HIGH COURT OF NAMIBIA

ANDREAS VAATZ **APPELLANT**

In the matter between:

HEINER SCHWEIGER **APPLICANT/DEFENDANT**

And

GAMIKAUB (PTY) LTD **RESPONDENT/PLAINTIFF**

CORAM: MULLER A J

HEARD ON: 2005.11.02

DELIVERED ON: 2005.11.11

JUDGMENT

MULLER, AJ:

[1] This is an application for leave to appeal brought by a legal practitioner, Mr Andreas Vaatz, in the matter between the Applicant/Defendant and Respondent/Plaintiff. I shall refer to the former hereinafter as “Schweiger” and the latter as “Gamikaub”.

[2] Mr Vaatz was represented by Adv. T J Frank SC in this Court who submitted the heads of argument on behalf of Mr Vaatz.

[3] The background of the matter is that Schweiger brought an application on an urgent basis to set aside a default judgment granted by the assistant Registrar of this Court and other relief. That application was opposed and answering and replying affidavits were filed. On 21 July 2005, after hearing arguments, Shikongo AJ granted the order prayed for by Schweiger and awarded costs on an attorney and own client scale *de bonis propriis.*

[4] Against this cost order, which is in effect an order against Mr Vaatz, the legal practitioner of Gamikaub, applied for leave to appeal against that cost order to the Supreme Court of Namibia. As far as I am aware, there is no application against the order made by Shikongo AJ on 21 July 2005 in respect of the merits by Gamikaub, the party who lost, so to speak.

[5] Schweiger who was successful on the merits in the said application did not oppose the application for leave to appeal by Mr Vaatz and there was no attendance on his behalf in this Court.

[6] At the outset I asked Mr Frank what the position is of the attorney, Mr Vaatz, applying for leave to appeal, while he was not a party to the said application. Mr Frank indicated that because the costs order is effectively one against the attorney, Mr Vaatz, he has an interest in this matter and consequently *locus standi* to apply in that capacity for leave to appeal. I was also referred to the heading of the application for leave to appeal which indicated Mr Vaatz as the Appellant. In the light of the decision that I have arrived at, it is not necessary pursue this aspect any further.

[7] I do not intend to repeat and discuss the arguments submitted by Mr Frank in this Court, save to make the observation that his arguments are based on the consideration of a possible prospect of success on the appeal. I shall refer to this in more detail later herein.

[8] In this Court, Mr Vaatz applied for condonation for the late filing of the application for leave to appeal and to extend the normal period of 15 days in terms of Rule 49 of the Rules of Court to 80 days or such period as the Court may determine to facilitate the hearing of the application within that period, as well as for leave to appeal against the cost order made by Shikongo AJ on

21 July 2005. That application was supported by an affidavit deposed to by Mr Vaatz.

[9] The reason for seeking condonation is set out in paragraph 3 of the supporting affidavit of Mr Vaatz. It is necessary to quote the entire paragraph which appears on pp. 126 to 127 of the record *verbatim:*

> "**3.**
>
> **APPLICATION FOR CONDONATION**
>
> **Immediately after the Honorable Acting Judge Shikongo made the order in this matter I realised that it was incorrect and more specifically the order regarding to costs were extremely unfair and without substance. I accordingly filed a Notice of Appeal to the Supreme Court on the 12th of July 2005, a copy of which I annex hereto marked Annexure "A". At that time I was under the impression that an order for costs - and the Notice of Appeal states that the appeal is only against the cost order - was a final order and thus appealable.**
>
> **In the meantime, I had written a letter to the Respondent's legal practitioner, Mr Bloch, a copy of which is annexed hereto marked Annexure "B" and requested him to come to an agreement with me regarding the security for costs of the appeal, but he did not answer to that letter. When I met Mr Bloch at the office of the Registrar on the 27th of September 2005 I asked him why he does not**

> **answer to the question of how much security he requires for the appeal, he told me that in his view there was no appeal. This remark caused me once again to peruse the Rules and the High Court Act and it is only then that I discovered to my surprise that in terms of *Section* 18(3) of the *High Court Act No* 16 of 1990 - one section that was not amended by the *Appeals Laws Amendment Act* 2001 - it is still required in respect of interlocutory orders and orders as to costs to apply for "leave to appeal" before one is entitled to note an appeal. This means that I only then became aware that I must make an application for leave to appeal in order to enable me to take the order for costs on appeal to the Supreme Court. I accordingly pray that it may please this court to condone the late filing of this application for leave to appeal**."

[10] It is not necessary to refer to the requirements for condoning non-compliance with the Rules of Court, save that a party seeking such condonation has to explain to the satisfaction of the Court why there was not compliance with the applicable Rules of Court and to show cause, in the sense of satisfying the Court that there is a prospect of success on appeal. It is further trite that the Court has a discretion to condone such non-compliance, or not. In this regard Plewman JA said the following in Darries v Sheriff, Magistrate's Court, Wynberg, and Another, 1998 (3) SA 34 at 40 G – 41 D:

> **"The number of petitions for condonation of failure to comply with the Rules of this Court, particularly**

in recent times, is a matter for grave concern. The reported decisions show that the circumstances which have led to the need for applications for condonation of breaches of the Rules have varied widely. But the factors which weigh with the Court are factors which have been consistently applied and frequently restated. See *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-H; *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G.

I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263H-264B; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E-F). In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for

condonation as soon as possible. See *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449F-H; *Meintjies's* case *supra* at 264B; *Saloojee's* case *supra* at 138H. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See *Saloojee's* case *supra* at 141 B-G. In applications of this sort the appellant's prospects of success are ill general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See *Meintjies's* case *supra* at 265C-E; *Rennie v Kamby Farms (Ply) Ltd* 1989 (2) SA 124 (A) at 131E-F; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10 E. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for

condonation should not be granted, whatever the prospects of success might be. See *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 28lJ-282A; *Moraliswani v Mamili (supra* at l0 F); *Rennie v Kamby Farms (Ply) Ltd (supra* at 131H); *Blumenthal and Another v Thomson* NO *and Another* 1994 (2) SA 118 (A) at 121I -122B."

[11] Mr Vaatz avers in terms of the first paragraph of the quoted paragraph 3 of his affidavit supporting the Notice of Appeal that he immediately after Shikongo AJ made the order, realized that it was incorrect and more particularly the costs order. Accordingly he filed a notice of appeal dated 12 July 2005. This allegation is of cause incorrect. The order was already made on 1 July 2005. From the notice of appeal attached by Mr Vaatz to his application for leave to appeal it also appears that, although that notice of appeal was dated 12 July 2005 and was served on Mr Bloch on 15 July 2005, it was only filed with the Court on 24 August 2005. The Registrar's stamp clearly indicates the date that the notice of appeal was filed, which was more than one and a half months after the order was made and more than a month after the reasons for that order were provided. No further explanation is provided for this inconsistency by Mr Vaatz in his own affidavit.

[12] Furthermore, Mr Vaatz makes the allegation in the first paragraph of the quoted paragraph 3 of his affidavit that he was under the impression at that stage that a notice of appeal would suffice, which was a final and appealable order. However, if this was his impression, his notice of appeal was in any event filed out of time as he had 21 days to file it after the order was made, or at least from the time when the reasons were given, namely on 21 July 2005. Again no explanation is provided why this was not done.

[13] Turning to the second paragraph of the quoted paragraph 3 of the affidavit of Mr Vaatz, I find his conduct quite incomprehensible. Leave to appeal was always required in appeals against cost orders. This was so in terms of section 20(2)(b) of the South African Supreme Court Act no. 59 and 1959 and is still so in terms of section 18(3) of the High Court Act of Namibia, no. 16 of 1990. The legislator's intention was to discourage appeals of this nature.

See: Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976 (4) SA 464 (A) at 488 D;

Delmas Ko-operasie Beperk v Koen 1952 (1) SA 509 (T) at 510 E – F; and

Tsosane and Other v Minister of Prisons 1982 (3) SA 1075 (C) at 1076 D

In the Lendalease Finance-case, *supra,* Corbett JA (as he then was) expressed his agreement with Millin J's remark in the Delmas-case, *supra,* where the latter stated:

> "**…it seems to me the intention of the Legislature was to make the test: what is the appeal against? If you are appealing against costs only but in no way appealing against any part of the judgment on the merits of the case, then the Legislature wished to discourage such appeals, and the manner selected for limiting them was to say that the Full Court should not be approached without the leave of the Judge who made the order."**

In the Tsosane-case King AJ (as he then was) set out the principles to be observed in an application for leave to appeal on p. 1076 E – p. 1077 A. These principles are summarised in Erasmus Superior Court Practice A1 – 50 (i) – (v):

> **(i) Such leave is not lightly given – firstly because costs are ordinarily a matter of judicial discretion; and secondly, because it is desirable that finality should be reached where the merits of a matter have been determined.**

(ii) The court will not ordinarily grant leave to appeal in respect of what has become a dead issue merely for the purpose of determining the appropriate order as to costs.

(iii) Leave will more readily be granted where a matter of principle is involved.

(iv) The amount of costs involved should not be insubstantial.

(v) The applicant for leave to appeal should have a reasonable prospect of success on appeal.

[14] Mr Vaatz further annexed the letter that he wrote to Mr Bloch to his affidavit in respect of coming to an arrangement with regard to security for costs and thereafter met Mr Bloch at the Registrar's office on 27 September 2005, at which occasion he discovered the reason why Mr Bloch did not answer his letter. In his affidavit he says that only after this date he once again perused the appropriate legal requirements and discovered that he needed leave to appeal. Mr Bloch was of course quite right to ignore the Applicant's notice to appeal in the circumstances.

[15] A legal practitioner has a duty of care towards his client and towards the Court to apply the Rules of Court properly, which implies that he/she must know the Rules of Court, or at least

make sure that he/she knows what the particular Rule requires before he/she applies it. With regard to this application of the Rules of Court, Slomowitz AJ made the following introductory remarks in the case of Khunou and Others v Fihrer and Sons 1982 (3) SA 353 (WLD) at 355 F – 356 D:

> "**The proper function of a Court is to try disputes between litigants who have real grievances and to see that justice is done. The Rules of Civil Procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to insure that the Courts dispense justice uniformly and fairly and that the true issues which I have mentioned are clarified and tried in a just manner.**
>
> **Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and more over are sometimes not appropriate to specific cases. Accordingly the**

Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt, and, if needs be, the Rules of Court, according to the circumstances. This power is enshrined in section 43 of the Supreme Court Act 59 of 1959.

It follows that the principles of adjectival law, whether expressed in the Rules of Court or otherwise, are necessarily flexible. Unfortunately this concomitant brings in its train the opportunity for unscrupulous litigants and those who wish to delay or deny justice to so manipulate the Court's procedures that their true purpose is frustrated. Courts must be ever vigilant against this and other types of abuse. What is more important is that the Court's officers, and especially its attorneys, have an equally sacret duty. Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute. Nothing less is expected of them, and if they do not measure up a Court will mark its disapproval either by an appropriate order as to costs against the defaulting practitioner or, in a proper case, by

referring the matter to the Law Society for disciplinary action.

Attorneys, whatever their personal likes and dislikes of one another may be, must ensure that the Rules serve their true purpose. Not only must they not permit and indeed must they prevent their client from using the Rules in the manner to which I have referred, they must themselves not use, or rather abuse, the Rules, merely in order to vent their spleen on one another."

Even the South African Appeal Court had on occasion pronounced on the duty of an attorney – a legal practitioner in Namibia. Wessels JA said the following in his judgment as reported on p. 92 B – E in Reinecke v Incorporated General Insurances Pty 1974 (2) SA 84 (A):

"**From the affidavits filed in support of the Notice of Motion, it appears that Appellant is in no way personally at fault in regard to the non-compliance with the Rules of this Court in respects set out above. From the affidavits sworn by his attorney, it appears that the latter's failure to lodge the Notice of Appeal and the record flowed from his ignorance of the Rules of this Court governing the procedure prescribed in regard to the noting and**

prosecution of an appeal. It is lamentable for an attorney to excuse his failure to comply with the Rules of this Court on the basis of his ignorance thereof. The more so when, as in this case, his failure to comply with the Rule requiring the lodging of a notice of appeal alerted him to the need to consult the Rules as to the further steps to be taken in the prosecution of the appeal. He did not do so; hence his failure to comply with the Rule relating to the lodging of the record. It is a matter of concern that, despite repeated references in reported judgments of this Court to the kind of default hereunder discussion, ignorance of the Rules of this Court continues to result in non-compliance therewith. (See eg, Rose and Another v Alpha Secretaries Limited, 1947 (4) SA 511; S v Yusuf, 1968 (2) SA 52; Federators Employers Fire and General Insurance Company Ltd and Another v McKenzie, 1969 (3) SA 360, and S v Brick, 1973 [2) SA 571)"

[16] In terms of Rule 27(3) of the Rules of this Court, the Court is entitled to condone any non-compliance with the Rules of Court on good cause shown. In this regard the Court has a discretion. The principles upon which such a discretion is exercised have

been set out in several cases, namely that there must be a satisfactory explanation furnished for the delay and that the party requesting the condonation must have a *bona fide* case.

See: Erasmus: Superior Court Practice B1 – 71 - 72

In respect of the first requirement it has been held that the Court will refuse to grant condonation when there has been a reckless and intentional disregard of the Rules of this Court.

[17] Although the period of 15 days for applying for leave to appeal only ran from 21 July 2005, the date when the Judge's reasons were delivered, Mr Vaatz knew from the day when the order was made, namely 1 July 2005 what the order was and he could already from that date commenced perusing the applicable Rules of Court and the High Court Act, as well as the applicable amendments. Then he would have been in a position to know what would be required when the reasons were delivered. Even if he did not do that, he had 15 days to apply for leave to appeal after the 21st July 2005 when the Judge's reasons were given. Such application had to be made within 15 Court days, namely it had to be filed with the Registrar not later than 11 August 2005, according to my calculations. Despite all this, Mr Vaatz continued under the impression that he only needed to file a Notice of Appeal, which he eventually did on 24 August

2005. He only applied for condonation and leave to appeal on 4 October 2005, despite being informed (on his own version) by Mr Bloch on 27 September 2005 that there is no appeal, which prompted him to properly peruse the appropriate Rules, the High Court Act and appropriate amendments. It again took him nearly a week to apply for condonation and for leave to appeal. I doubt it that it would take any legal practitioner more than an hour to ascertain to what is required in terms of Rule 49, section 18(3) of the High Court Act no. 16 of 1990 and section 3 of the Appeal Laws Amendment Act, no. 10 of 2001.

[18] An applicant applying for condonation in fact requests the Court's indulgence and has to provide a satisfactory reason or reasons for the failure to comply with the legal requirements, in this case to timeously apply for leave to appeal. The Court has to rely on the veracity and the truth of the reasons provided. In this matter Mr Vaatz did not put the correct facts before the Court in his supporting affidavit, as referred to earlier herein. Furthermore, Mr Vaatz conceded that he did not comply with the appropriate Rule of Court. The only inference to be drawn from this is that he did not know it. The legal position and the attitude of the Court have been spelled out in the decisions quoted by me earlier herein and in particular in the passage in Darries-case quoted *in extenso* by me in paragraph [10] hereof. A legal practitioner should either know the requirements set out

in the appropriate Rule or Acts and even if he does not know it, he has to peruse the appropriate provisions immediately, but definitely before he takes any action. Mr Vaatz nearly had a month after the order was made, but before the reasons were delivered, to do this. Even thereafter he waited for nearly another month before filing a Notice of Appeal with the Registrar.

[19] Although a reasonable prospect of success in the appeal is a further requirement, the Applicant in my submission failed to cross the first hurdle, namely to provide a satisfactory explanation for his failure to apply for leave to appeal in time. The correct way of dealing with such a situation, has in my opinion been set out by Plewman JA in the Darries-case quoted in paragraph [10] above.

[20] In the light of the decision I have arrived at, it is not necessary to deal with the arguments submitted in respect of the prospect of success and in particular the arguments advanced by Mr Frank in this regard. Consequently, the first prayer of the Applicant for condonation is refused.

[21] There was no opposition to the application. The only costs that I am aware of is those of Mr Vaatz himself. Consequently, no cost order in respect of this application will be made.

[22] Condonation is refused and the application for leave to appeal is dismissed.

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MULLER A J