

Heard: 24 June 2020

Delivered: 9 July 2020

Flynote: Administrative Law – review in terms of Rule 76 – failure to file review record as ordered by the court – condonation for non-compliance with court order – requirements for condonation considered – whether applicant for condonation for failure to file a record should satisfy court regarding prospects of success – the nature and purpose of a record of review proceedings discussed – Rules of Court – Rule 32(9) and (10) – whether applicable to applications for condonation - Legal Ethics – propriety of legal practitioners deposing to affidavits – whether the fact of a legal practitioner being inundated with work is an excuse for not complying with court orders.

Summary: The applicants in this matter filed an application for condonation of their non-compliance with a court order putting them to terms to file a record of the proceedings appertaining to the decision of the Minister of Urban and Rural Development designating the third applicant as Kaptein of the Witbooi Clan. The applicants failed for a period in the excess of four months to file the record of proceedings. They subsequently filed the said record and later made an application for the condonation of their non-compliance with the court order. This application was opposed by the respondents, claiming that there is no reasonable explanation for the delay and that the applicants failed to show that they have prospects of success on the merits.

Held: that because an application for condonation is made to the court, it is not strictly necessary for the parties to comply with rule 32(9) and (10). The court reasoned that even if the parties may agree, on the success of the application and which the court may, in appropriate cases, take into account, that does not mean that the court is bound by the agreement of the parties.

Held that: in an application for condonation for the late filing of a record of review proceedings, the normal requirements for condonation do not always strictly apply. This is because the record plays a pivotal role in such matters

and assists the court in deciding on the sustainability or otherwise of the application for review.

Held further that: where it otherwise, a party can successfully oppose the application for condonation thus robbing the parties of the salient portions of the record. As a result, the court would be impeded from properly performing its constitutional review function in the absence of benefit that would have been obtained from the record of proceedings.

Held: that legal practitioners should not, save in very exceptional circumstances, depose to affidavits in matters handled on behalf of clients. Even then, the reason why the client has not deposed to the affidavit, must be explained to the court's satisfaction in the said affidavit.

Held that: legal practitioners cannot fail to comply with court orders by stating that they were busy with other matters as the essence of the life of a legal practitioner, as Cicero states, is being busy with little time for other distractions.

Held further that: the most appropriate way of the court showing its disapproval with the non-compliance with court orders, is not to dismiss the application condonation but for the guilty party to pay the costs. In this regard, it was amply demonstrated that it was the applicants' legal practitioners who were in the wrong and as such, it was appropriate for them to pay the costs *debonis propriis*.

The application for condonation was thus granted but the applicants, though being successful, were, subject to what is stated in the immediately preceding paragraph, ordered to pay the costs.

ORDER

1. The application for the condonation of the late filing of the Record of Proceedings in this matter is hereby granted.
2. The Office of the Government Attorney is ordered to pay the costs of the application *de bonis propriis*, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The costs referred to in paragraph 2 above, are not subject to the provisions of Rule 32(11) of this Court's Rules.
4. The matter is postponed to 16 July 2020 for the appointment of a hearing date of the main application for review.

RULING

MASUKU J:

Introduction

[1] This is an opposed interlocutory application moved by the applicants for the condonation of the late filing of the record of review proceedings and the upliftment of bar imposed by Part 6 of this court's rules. The applicants also pray that the record of the review proceedings already filed be accepted as one filed of record in these proceedings.

Background

[2] The respondents herein brought an urgent application in two parts. The first was an urgent application seeking an interim interdict preventing the first applicant herein from implementing his decision to approve the designation of the third applicant as Kaptein of the Witbooi clan. The second part was an application for review of the first applicant's aforesaid decision.

[3] Part A of the application i.e. for the granting of the interdictory relief was refused. The court then proceeded to manage the case further. In this regard, the court issued an order dated 17 October 2019, calling upon the

respondents to file the review record on or before 11 November 2019. It is now history that this order was not complied with by the respondents. In view of this non-compliance, the applicants have approached this court seeking the relief stated in the immediately preceding paragraph.

[4] Shorn of all the frills, the applicants' explanation, is deposed to by Mr. Himeekua Ronald Ketjijere, the respondents' legal practitioner. He deposes that the matter was being handled by Mr. Kandovazu, who subsequently left the chambers of the Government Attorney. It was stated that he is the only person who could shed light on the reasons for the non-compliance to the court. Initial efforts to get an affidavit from Mr. Kandovazu drew a blank.

[5] It was much later that Mr. Kandovazu filed an affidavit explaining the non-compliance. His explanation, stripped to the bare bones, is that he indeed moved from the Government Attorney's office after tendering his resignation. He confirms that he had been handling the matter. He attributes the non-compliance to his being inundated with work, primarily in the Supreme Court during the relevant time, namely, around October 2019. In November 2019, he states further, he was serving his notice, pending his departure.

[6] Mr. Kandovazu admits that the failure to file the record was due to him being busy at the material time, thus leading to 'an unfortunate oversight on my part, which ultimately meant that the review record was not filed on time.' He states that the failure to file the record was not wilful nor due to a flagrant disregard of the rules of this court by him. Finally, he requests the court, in the interests of justice, to grant the application and that if the order were not granted, it would frustrate the completion of the matter.

[7] The respondents in the matter, ably represented by Ms. Campbell took the position that the applicants for condonation had failed to meet the bar. This is because the applicants failed to proffer a reasonable and detailed explanation for the delay and one that takes into account the full period of delay. It was Ms. Campbell's further argument that the prospects of success are not dealt with convincingly by the applicants.

[8] Ms. Campbell also argued that the fact that Mr. Kandovazu was busy, is not a reason that explains the delay, as it is innate in the business of lawyers to be busy. In that schedule, regardless of how tight and uncompromising it is, legal practitioners have to deliver on the mandate to their clients and the court. Being inundated with work can never be an excuse, she further argued.

[9] The respondents also took issue with the affidavits filed by the applicants' legal practitioners in this matter. In particular, the court's attention was drawn to the judgment in the *Paolo* matter *infra*, where Angela DJP decried the escalating tendency of legal practitioners to file affidavits in matters where they appear on behalf of their clients. She requested the court to draw the line in the sand on this growing tendency in order to drive the point home.

[10] Another bone of contention raised by the respondents, is the propriety of the filing of the affidavit deposed to by Mr. Kandovazu, without leave. The court was implored to ignore it altogether as it is out of sync with the sequence and order of filing affidavits. The applicants should, Ms. Campbell argued, have applied for leave to file this affidavit, as it was filed after the founding affidavit but before the answering affidavits were filed.

[11] I do not intend to belabour the issues arising in any greater detail. The main question to be answered is whether this is a matter in which the applicants have made a case, thus requiring that the court's discretion should be exercised in their favour. It is to that question that I will, barring one issue, immediately turn.

Rule 32(9) and (10)

[12] This is the issue that has to be dealt with and referred to in the immediately preceding paragraph. The respondents took the point that the applicants had not complied with the provisions of rule 32(9) and (10) before launching this application for condonation. These rules mandatorily require

parties to an interlocutory application to first genuinely and in good faith attempt to resolve the matter amicably before launching the application.

[13] Ms. Campbell informed the court that she does not agree with that approach, although it was raised on her clients' behalf. I agree. It must be recalled that condonation is an application brought by the errant party to the court, which must make the final decision. In this regard, it must be made plain that all that the parties to the matter can do, even if the party not on the wrong side of the rules agrees, is not to oppose the application when eventually filed. The court is not bound by whatever agreement the parties come to in respect of the condonation as the power to condone resides in the court and the court alone.

[14] Accordingly, what the parties may do is to agree about the other party not opposing the application and advise the court accordingly. Having done so, the errant party should still file the application for condonation and which the court will decide, based on the merits. In this regard, although the view of the parties may be considered, ultimately it is the court that has to decide the matter, based on the papers before it. In the premises, it is strictly not necessary for parties to comply with rule 32(9) and (10) in applications for condonation.

[15] Ms. Campbell must accordingly be commended for her ethical approach to this issue. The court expects no less from its officers. For this reason, I find and hold that there was no need for the applicants in peculiar circumstances of this matter, to have complied with the requirements of rule 32(9) and (10). That issue eternally rests at this particular juncture.

The merits

[16] The respondents, intimated above, argued that the applicants have placed a dismal application for condonation before court. I agree. An applicant for condonation must satisfy the court that it has a reasonable explanation for

the delay resulting in the non-compliance. It must also show that it has prospects of success on the merits.¹

[17] For starters, it is clear that the entire period of the delay is not fully explained by the applicants. To the extent that the court can properly have regard to Mr Kandovazu's affidavit, he chiefly complains of having been busy at the material time with a number of matters heard in the Supreme Court. Is that an acceptable and reasonable explanation that the court can count in the applicants' favour?

[18] In response, Ms. Campbell, once again referred the court to the timeless words of Cicero, *infra*. I say once again for the reason that in *I A Bell Equipment Co Namibia (Pty) Ltd v E S Smith Concrete Industries CC*² in which case she appeared and referred the court to the words attributed to Cicero.

[19] The timeless words, spoken in 54BC were given a new lease of life in *Nedbank v Louw*.³ Cicero said:

'The reason for the lateness, he said, was pressure of work and he apologised. Now although an apology seems to express good manners, it is not a basis for condonation. The pressure of work in the life of a legal practitioner is nothing new. In *A Barrister's History of the Bar*, H G Hamilton quotes a letter, which Cicero wrote to his brother in late August of the year 54 BC:

"When you get a letter from me in the hand of one of my secretaries, you can reckon that I didn't have a minute to spare; when you get one in my own, that I did have one minute! For let me tell you I have never in my life been more inundated with briefs and trials, and in a heat-wave at that, in the most oppressive of time of the year. But I must put up with it."

[20] It is accordingly clear that being busy is one of the terms a legal practitioner signs up to when they choose to be in practice. This term, I must

¹ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC), p640 para 10.

² (I 1860/2014) [2015] HAHCMD 68 (23 March 2015).

³ 1965 (2) SA 135 (AD) at 141C-E.

say, is not written in small print or hieroglyphics. It the essence of a lawyer's life and calls in this regard, for long hours of work and ambidexterity, when called for. There are no sacrificial lambs when it comes to clients or their work. In an office like that of the Government Attorney, where there are a number of legal practitioners, unlike in a one-man or woman firm, and to whom the filing of the record should have been delegated. That Mr. Kandovazu was extremely busy is therefor not an acceptable or reasonable excuse befitting his excusal from blame for the catastrophe.

[21] I revert to Ms. Campbell's argument that the court should not have any regard to Mr. Kandovazu's affidavit. On a strict legal interpretation of the rules and civil procedure, the argument by Ms. Campbell is totally unassailable. What I have said above does serve to exemplify that even if the court has regard to it, it takes the applicants' case nowhere regarding the question of the explanation for the delay.

[22] Ms. Campbell proceeded to argue that the applicants failed to show that they have reasonable prospects of success in the main matter. I asked both Ms. Campbell and Ms. Kahengombe about the role prospects of success should play in a matter like this. This was perhaps a question that was unexpected from the court. Ms. Kahengombe argued that prospects of success have no role to play. Ms. Campbell adopted an opposite stance.

[23] I am of the considered view that when one has proper regard to the nature of the present application, it stands on a different footing from most applications for condonation. I say so because in most applications for condonation, the issue of prospects of success correctly plays a critical role in the success of the application. In a case such as the present, the respondents were put on terms to deliver the record and they did not do so in good time.

[24] In matters of review, the issue of prospects of success only comes out of the shell once the record has been delivered and from that point, a party may with less diffidence, state what his or her prospects of success are. A rhetorical question may then be asked: if a party which has been ordered to

file a record of proceedings in a review application, fails to do and maybe has no reasonable prospects of success and has no reasonable explanation for the delay in filing the record, should the court then dismiss the application therefor? Would that order serve the interests of justice?

[25] I am of the considered opinion that in such an event, the answer may well lie in a proper and mature consideration of the role and purpose of the record of proceedings in applications for review. In *Democratic Alliance and Others v Acting National Director of Public Prosecutions*⁴ it was held that:

‘Without a record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.’

[26] In *Helen Suzman Foundation v Judicial Service Commission*, Maya DP made the following remarks regarding the rule 53, relating to review:

‘[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review the decision of an inferior court, administrative functionary or state organ, access to the record of proceedings in which the decision was made, to place the relevant evidential material before court. It is established in our law that the rule, which is intended to operate to the benefit of the applicant, is an important tool in determining objectively what considerations were probably operative in the mind of the decision-maker when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties at an equal footing in the assessment of the lawfulness and rationality of the decision. By facilitating access to the record of the proceedings under review, the rule enables the courts to perform their inherent review function to scrutinise the exercise of public power and compliance with constitutional prescripts. This in turn gives effect to a litigant’s right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before the court with issues properly ventilated.’⁵

⁴ [2016] 3 All SA 78; SACR 1 (GP); 2016 (8) BCLR 1077.

⁵ (145/2015) ZASCA 161 (2 November 2016); [2017] 1 All SA 58 (SCA); 2017 (1) SA 367 (SCA), para 13.

[27] Yet, in *Turnbull-Jackson v Hibscus Coast Municipality*, the following important remarks were made by the court:⁶

‘Undeniably, a rule 53 record is an invaluable tool in the review process. It may help shed light on what happened and why; give the lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker’s stance; and in the performance of the reviewing court’s function.’

[28] These judgments reflect accurately, the place and purpose of a review record even in this jurisdiction. They accordingly constitute persuasive authority in this jurisdiction and are good law in any event. What is plain is that the record, in many cases assists the applicant in making out a case as there may be issues or happenings that may have taken place in his or her absence, but which may be crucial to the proper determination of the application for review.

[29] At the same time, the record is not just for the parties, but it also assists the court in dealing with the matter, fully alive to all the material facts that may affect the propriety of the decision reached. For that reason, it appears that the filing of the record resonates with the interests of justice in that it enables those who may not have been present, to get a view of what happened in a boardroom, or office where a decision sought to be impugned was taken.

[30] In this regard, the record is an enabler to the court to properly carry out its constitutionally empowered mandate to ensure that the rule of law, the principal of legality and where appropriate, the rights accorded to parties in terms of Article 18 of the Constitution, are properly protected. The record of proceedings enables the court to right wrongs where they occurred, including those issues that the parties may not have been aware of before access to the record.

⁶ (7929/2009) [2012] ZAKZPHC 63 (26 September 2012).

[31] It would accordingly appear to me that the respondents' opposition to the application for condonation in this matter, was tantamount to them shooting themselves in the foot as the record of proceedings is primarily for their benefit and they can, in appropriate cases, cement the case on it. In this case, it does not appear proper that the respondents can properly oppose the admission of the record of proceedings and at the same time seek to rely on it in making their case.

[32] In *New Era Investment (Pty) Ltd v Roads Authority*,⁷ Damaseb DCJ stated the following about a review record:

'It is trite that in review proceedings the production of the record of proceedings and accompanying reasons sought to be reviewed is for the benefit of the applicant. It has been recognised in a long line of cases that an applicant seeking review may waive the right to obtain the record of the proceedings and the accompanying reasons and proceed to the hearing without first obtaining it.'

[33] I did not understand the respondents in this matter, to be saying they are waiving the filing of the record of proceedings. As will be shown, they opposed the condonation of its late filing, but still appear keen to reaping what may be low-lying fruits from the review record.

[34] In the premises, it would appear to me that issues of condonation for the late filing of the record of proceedings in review applications should be considered from a different perspective than in other applications for condonation. This is because regardless of how remiss the party called upon to deliver the record may have been, it would not ordinarily be a proper course for the court to punish the errant party by refusing the application for the condonation, resulting in the record not being filed, or where filed, not being resorted to.

[35] As indicated above, the record not only assists the parties to properly and insightfully present their respective cases to court, but it also places the court in a position where it has a full appreciation of what took place, the

⁷ 2017 (4) NR 1160 (SC), para 19.

rights and wrongs that may have occurred. It thus plays a pivotal role in the machinery to sustain a country based on the principle of legality and the rule of law, where decisions of functionaries and administrative officials, which affect individuals, are properly decided, with the court armed with all the correct and necessary authentic information.

[36] I accordingly come to the considered view that although the applicants' case for condonation is as hopeless as cases come, it would, however, do the interests of justice and fairness a fatal blow for the court to refuse the condonation as that would effectively rob both the court and the parties the information that may be critical and decisive in the proper resolution of the dispute amongst the parties.

[37] To the extent that the court may wish or find it appropriate to display its displeasure at the applicants in this case for the levity with which they dealt with the filing of the record, the refusal to admit the record because of failing the bar of condonation is not the panacea. This is because of the potential that decision may have on the court not having all the pertinent information to place it in a vantage position to properly decide the matter. The court is not bereft of formidable weapons in its arsenal to address this malady. This weapon of choice, will be revealed at the end of the judgment.

Legal practitioners deposing to affidavits

[38] Ms. Campbell correctly took serious issue with the approach of the applicants in this matter in that all the affidavits filed in support of the application for condonation, were deposed to by legal practitioners of this court. None of the clients filed any affidavit at all, even a confirmatory one. One cannot help but wonder whether a legal practitioner has *locus standi* to move such an application without the evident involvement of the concerned client.

[39] This is a practice that needs to be nipped in the bud in this jurisdiction, as some practitioners are hell bent on willy-nilly deposing to affidavits that

their clients ought to have deposed to. In some cases, especially in those relating to condonation, where this practice is rife, the question arises in some instances whether the clients even know about the applications at all. Some of these application initiated and deposed to by legal practitioners may be necessitated by the natural instinct of self-preservation and survival.

[40] Our courts have spoken times without number regarding the impermissibility of legal practitioners deposing to affidavits in matters where they appear on behalf of their clients. This nefarious practice also extended to rule 108 applications and a stern rebuke in that particular area appears to have immediately struck the right chord and thus stemmed the tide.

[41] Ms. Campbell referred the court in particular, to the judgment of Angula DJP in *Prosecutor-General v Paulo and Another*⁸ where the learned Judge stated as follows:

'I feel obliged to make an observation here that this practice by legal practitioners of filing an affidavit on behalf of a client should be discouraged and desisted from. It should only be resorted to in exceptional circumstances for instance where the party to the proceedings is for compelling reasons unable to depose to an affidavit. Such reason must be disclosed in the affidavit deposed to by the legal practitioner. . . In the event of disputes of facts in affidavits arising which cannot be resolved by the approach to resolving disputes in motion proceedings commonly referred to as the *Plascon-Evans* rule and the matter has to be referred to oral evidence, in such event the legal practitioner will have to become a witness. Such a scenario would be undesirable. It is further undesirable for a legal practitioner to depose to an affidavit on behalf of a client dealing with factual issues. A legal practitioner cannot be astride two horses at the same time, namely be a witness and also a legal practitioner subject to ethical rules of conduct.'

[42] In the instant case, there is no allegation that there are any exceptional circumstances that render it necessary for the legal practitioners of the respondents to have personally deposed to the affidavits. Furthermore, no compelling explanation, as stated by the learned DJP, is proffered by the

⁸ 2017 (1) NR 178 (HC), at p.184, para 16.

respondents' legal practitioners fitting the excusal of their clients from deposing to the affidavits.

[43] A sentiment may have been expressed that in matters of condonation, the legal practitioner may depose to the affidavit. What is plain from the *Paulo* judgment, is that the explanation therefor, must be given to the court and the situation giving rise to the need for the legal practitioner to file an affidavit, should be exceptional and compelling. The court should independently be satisfied and confirm the propriety of the excusal of the client from deposing to the affidavit and the necessity of the legal practitioner deposing to the affidavits.

[44] The law allows clients, in matters where they may not be directly *au fait* with the matters, to rely on what was imparted to them, in this case by the legal practitioner, subject of course to the legal practitioner filing a confirmatory affidavit in that regard. There is no reason why this procedure was not followed by the applicants' legal practitioners in this case because whatever the case, it is unseemly for the legal practitioner to play two disparate roles as stated in the *Paulo* case.

[45] The legal practitioners end up standing in a no-man's island between the witness box and the Bar, where counsel address the court. In this wise, they end up being nowhere precise, neither full officers of the court, nor fully-fledged witnesses. That hybrid, nondescript species, is not acceptable. The court, in the process, loses the independence and objectivity of the legal practitioners, which are necessary ingredients in legal practitioners properly performing their primary duty to court.

Conclusion

[46] Having anxiously considered the papers in this matter, together with the argument presented on behalf all the protagonists, I am of the considered view that this is not a proper case in which the court should refuse the application for condonation. The interests of justice and the search for the

truth may be dealt a shattering blow if that order were to be issued in this case. The application for condonation should for that reason, be granted.

Costs

[47] Regard had to the discussion in the judgment, one issue sticks out like a sore thumb. It is the unacceptable behaviour of the applicants' legal practitioners who violated an order of court and remained in violation thereof for months on end. As a result, this matter was delayed for months. It is necessary for the court to express its disapproval of such conduct, where appropriate, by litigants and legal practitioners alike.

[48] This, being an interlocutory application, should, all things being equal, be subject to the cap stated in rule 32(11). To communicate the court's displeasure at the manner in which this matter was handled by the applicants' legal practitioners, it is appropriate that the costs should not be capped by rule 32(11). It is also unfair that the Government Attorney's clients should be responsible for bearing the brunt of the costs in this matter. The Office of the Government Attorney should, in the instance do so.

Order

[49] In view of the considerations recorded above, the following order commends itself as being appropriate in the circumstances:

1. The application for the condonation of the late filing of the record of proceedings in this matter, is hereby granted.
2. The Office of the Government Attorney is ordered to pay the costs of this application *de bonis propriis*, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The costs referred to in paragraph 2 above, are not subject to Rule 32(11) of this Court's Rules.
4. The matter is postponed to 16 July 2020 for the appointment of the date of hearing of the main application for review.

T.S. Masuku
Judge

APPEARANCES:

APPLICANTS

S. Kahengombe
Of Government Attorneys
Windhoek

RESPONDENTS

Y. Campbell
Instructed by Dr. Weder Kauta, Hoveka Inc.,
Windhoek