



**REPORTABLE**

CASE NO: SA 16/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**TUHAFENI JONAS**

**Appellant**

and

**ONGWEDIVA TOWN COUNCIL**

**Respondent**

**Coram:** MAINGA JA, MOKGORO AJA and NKABINDE AJA

**Heard:** 08 October 2019

**Delivered:** 27 January 2020

**Summary:** This appeal concerns an interdict and restraining order against the appellant. On 14 September 2012 the boundaries of the respondent were altered to include Omatando area or farm Ongwediva Townlands Extension 1156 by Proclamation No. 238 of 2012, which included Omatando area within which appellant held a piece of land. On 8 July 2017, the respondent held a meeting with the residents of Omatando and informed them that it will be formalizing Farm Ongwediva Townlands Extension 1156 and that the residents should not erect any structures thereon. Despite this meeting, the appellant commenced putting up structures on the plot he allegedly owned, which plot was now owned by the respondent. The respondent averred that the structures so built by the appellant

have not been approved, therefore they are illegal. In addition, such said structures have been erected in the middle of a public road, thereby obstructing access to the road. He was instructed to stop any further construction on the plot, however he decided to ignore same. The respondent, having no other option, lodged an urgent application in the court *a quo* seeking an interdict against the appellant restraining him from carrying on any construction on the respondent's property, vacate the same, demolish any and all structures already constructed on the plot at his own cost and bear the costs of the respondent's application on a punitive scale. The appellant opposed the application alleging that he had purchased the plot in question from one, Karolina Mulongeni in August 2010 for N\$35 000 and such piece of land was allocated to him by the Village Headman, Mr Johannes Mulongeni in terms of s 20 of the Communal Land Reform Act 5 of 2002 (CLRA). He believes that he owns the plot and the respondent should have compensated him in terms of Art 16(2) of the Namibian Constitution read with s 16 of the CLRA.

The court *a quo* held that the plot in question belongs to the respondent. As far as compensation was concerned, the court *a quo* noted that, that was a separate action. The court *a quo* as a result granted the respondent's application with punitive costs, as between attorney and own client.

This appeal was lodged way out of time. The appellant applied for condonation for the late lodging of the appeal. The explanation offered by the appellant's legal practitioner in her affidavit was that she was under the impression that the record was to be filed within three months from the date the notice of appeal was filed, instead of the date when the judgment or order was granted.

*Held*, that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation, it is not a mere formality.

*Held* that the explanation tendered by the legal practitioner offered no satisfactory explanation for her remissness for not complying with the rules of this court and

that her degree of negligence went so far that the appellant cannot escape the results of his legal practitioner lack of diligence.

*Held* that there are no prospects of success as the appellant's reliance on Art 16(2) of the Constitution and s 16 of the CLRA is misplaced. Application for condonation refused with costs. Appeal struck from the roll.

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### APPEAL JUDGMENT

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MAINGA JA (MOKGORO AJA and NKABINDE AJA concurring):

#### Introduction

[1] This appeal concerns an interdict and restraining order against the appellant. He was interdicted and restrained from carrying on any construction on the respondent's property described as Omatando Area, Ongwediva or Farm Ongwediva Townlands Extension 1156 situated in the registration division A, Oshana Region, to vacate the same and demolish any and all structures already constructed on the property and to bear the costs associated with the removal and/or demolishing of any structures constructed on the respondent's property.

[2] The facts giving rise to this appeal are common cause. On 19 February 2018 the respondent (applicant then) brought an urgent application in the High Court Northern Local Division at Oshakati against the appellant seeking the following relief:

'TAKE NOTICE THAT **ONGWEDIVA TOWN COUNCIL**[L] (hereinafter called the applicant) intends to make application to this court for an order

1 8.1 Condoning Applicant's non-compliance with the Rules of this Honourable Court relating to service and forms and authorizing the applicants to bring this application on an urgent basis as contemplated in Rule 73 of the Rules of this Honourable Court;

8.2 Interdicting and restraining the Respondent from carrying on any construction on the applicant's property currently described as Omatando as per annexure "OTC1";

8.3 Ordering the Respondent to vacate the aforesaid applicant's property within 7 days from the date of this order being made final, and to demolish any and all structure(s) already constructed on the property, failing which the Deputy-Sheriff, Ongwediva, be and is hereby authorized to take such steps as are necessary to give effect to this order;

8.4 That the Respondent's be ordered to bear the costs associated with his removal and/or demolishing of structures from the applicant's aforesaid property.

8.5 That the Respondent be ordered to bear the costs of this application at the rate between attorney and own client;

8.6 That the Applicant be granted such further relief and/or alternative relief as to this Honourable Court may seem fit.'

[3] The dispute between the parties arose as a result of a piece of land described as Omatando area, in Ongwediva or Ongwediva Townlands Extension 1156. It is common cause that Ongwediva Town Council/Local Authority was established in terms of the Local Authorities Act 23 of 1992 (LAA). On 14 September 2012, the Minister of Regional and Local Government Housing and Rural Development extended the boundaries of Ongwediva Town Council per Government Notice No 238 published in Government Gazette No 5038 of 14

September 2012 to include Omatando area, or Farm Ongwediva Townlands Extension 1156, situated in the Registration Division A, Oshana Region. The notice in its entirety is in this form:

**'MINISTRY OF REGIONAL AND LOCAL GOVERNMENT,  
HOUSING AND RURAL DEVELOPMENT**

No. 238

2012

ALTERATION OF BOUNDARIES OF THE LOCAL AUTHORITY AREA OF  
ONGWEDIVA: LOCAL AUTHORITIES ACT, 1992

Under section 4(1)(b) of the Local Authorities Act, 1992 (Act No. 23 of 1992), I alter the boundaries of the Local Authority of Ongwediva referred to in item 30 of the Second Schedule to Proclamation No. 6 of 03 March 1992, by adding Farm Ongwediva Townlands Extension 1156 situated in the Registration Division A, Oshana Region and represented by Cadastral Diagram A 435/2011 which diagram lies open for inspection at the office of the Surveyor-General. Windhoek, during office hours.

**J. EKANDJO**  
**MINISTER OF REGIONAL AND LOCAL**  
**GOVERNMENT, HOUSING AND RURAL**  
**DEVELOPMENT**  
2012'

Windhoek, 20 August

[4] The appellant allegedly had customary land rights to a plot within the Omatando area, which he had purchased from one Karolina Mulongeni for N\$35 000 during August 2010. The said piece of land was thereafter allocated to him by the village headman, Mr Johannes Mulongeni in terms of s 20 of the Communal Land Reform Act 5 of 2002<sup>1</sup> (CLRA).

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<sup>1</sup> Power to allocate and cancel customary land rights.

[5] On 8 July 2017, the Town Council held a public meeting at the extended property and invited all the residents to attend the said meeting. The residents were informed of the formalisation of the Omatando informal areas, in particular they were informed that pending the formalisation of the layout of the area, no structures (I suppose permanent) may be erected on the plot. The meeting was necessary as several residents were threatening to erect permanent illegal structures notwithstanding that the said area was annexed to the Town Council.

[6] Notwithstanding the meeting held with the residents, appellant went ahead and erected an illegal and unapproved structure on his plot. Worse still, the structure so put up protruded into the middle of a public road, obstructing road users.

[7] The illegal structure was discovered on 4 January 2018 by a building inspector, one Mr Nestor Iimene, during a routine patrol. Appellant was thereafter verbally informed that his construction was illegal and part of it was in the road. He was showed the layout map and instructed to stop the construction immediately. On the same day the illegal structure was discovered (4 January 2018) a letter was addressed to the appellant informing him of the legal status of the Omatando area and he was referred to the consensus reached between the residents of Omatando area and the Town Council on 8 July 2017. The respondent reiterated the fact that no structure should be put up on the plot. He was further instructed to stop the construction and demolish the same.

20. Subject to the provisions of the Act, the primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests –

- (a) in the Chief of the traditional community; or
- (b) where the Chief so determines, in the Traditional Authority of that traditional community.

[8] On 8 January 2018, appellant visited the respondent's offices, where he was shown a standing council resolution that Omatando residents must put on hold any construction on the property until the finalisation of the formalisation process. Appellant insisted that he would continue with the structure. On a further visit to the area on 16 January 2018, it revealed that appellant was continuing with the construction. On 17 January 2018, respondent addressed a further letter to the appellant and repeated earlier on demands which appellant refused to oblige with.

[9] As a result of the appellant's conduct, the respondent on an urgent basis sought the relief as above against the appellant. Appellant opposed the application, the crux of this opposition being that the State could not have withdrawn the Omatando area from the communal land without having compensated the inhabitants of such land and therefore, respondent failed to comply with the statutory procedures, resulting in the land not having been withdrawn and it could not be said the land in dispute was the property of the respondent.

[10] The court a quo rejected appellant's contention and granted the relief as sought on 12 March 2018.

[11] Appellant appeals against the whole judgment and order of the court a quo.

[12] The notice of appeal was lodged a month later on 12 April 2018. This means the notice was filed out of time. Rule 7 of this court provides that every

appellant in a civil case who has a right of appeal must file his or her notice of appeal with the registrar and the registrar of the court appealed from and serve a copy of the notice on the respondent or his or her legal practitioner within 21 days or such longer period as may be allowed on good cause shown, after the judgment or order appealed against . . . has been pronounced. In place of filing within 3 months from the date of the judgment, (12 June 2018) it was filed 40 days later on 23 July 2018. On the same date, the appellant lodged the condonation application for the late filing of the record. The application for condonation was in my opinion defective in that it only sought condonation for non-compliance with the rules of this court and for the late filing of the appeal record without seeking reinstatement of the appeal.

[13] On 27 June 2018, appellant's legal representatives received a letter from the Deputy Registrar of this court stating amongst other things, that the appellant failed to comply with rule 8(2) in that the appeal record was not filed by 12 June 2018 and that no copies of consent were received from the respondent agreeing in writing to filling the record at any other further period and that the appeal is deemed on the basis of rule 9(1)(c) to have been withdrawn. There was an attempt to obtain consent from the respondent to file the appeal record at a further date in terms of rule 8(2)(c), ie 6 July 2018, but as indicated above the record was only filed on 23 July 2018.

[14] The amended notice of motion seeking among other things condonation for the late payment of security for respondent's costs and reinstatement of the



appeal was only filed on 9 September 2019, about a month before the hearing of this matter.

[15] The respondent did not oppose the application for condonation for the late filing of the record, late payment of security for costs and reinstatement of the appeal. In her affidavit supporting the application for condonation, the appellant's legal practitioner explained that there were misunderstandings pertaining to the preparation of the record and that that caused a delay, as the record was only certified as correct by the Registrar on 25 June 2018. She further explained that in the process of preparing the record, she was under the mistaken impression that the record was to be filed within 3 months from the date of noting the appeal and that in this case that period would have lapsed on 12 July 2018.

[16] The affidavit accompanying the condonation application must set out a full, detailed and accurate explanation for the failure to comply with the rules<sup>2</sup>, and must also establish prospects of success on appeal

[17] The assertion that there were misunderstandings pertaining to the preparation of the record is vague, so is the explanation that she was under the mistaken impression that the record was to be filed within 3 months from the date of noting the appeal, and that in this case that period would have lapsed on 12 July 2018. Even on her own mistaken impression, she failed to file the record on or about 12 July 2018. The respondent had agreed to an extension of 6 July 2018 for

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<sup>2</sup> *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at 640A, para 9. See also unreported judgment per Langa AJA, *Beukes and another v South West Africa Building Society (SWABOU) and Others*, case no 10/2006, para 13.

filing of the record, but the legal practitioner failed to meet that date too, which renders her explanation on that point, with respect, false.

[18] Rule 8 (2) (b) provides for 'within three months of the date of the judgment or order appealed against . . .'.<sup>3</sup> Had she taken time to read the rule, she would not have harboured that mistaken impression. In *Kleynhans v Chairperson of Municipality of Walvisbay*,<sup>4</sup> this court referred with approval to *Ferreira v Ntshingila*<sup>5</sup> where Friedman AJA said at 281G:

"An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A-B. Inasmuch as an applicant for condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays have occurred."

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<sup>3</sup> **Filing of record**

8. (1) After an appeal has been noted in a civil case 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.

(2) The record referred to in subrule (1) must be filed –

- (a) in a case where the order appealed against was given on an exception or an application to strike out, within six weeks after the date of the said order or, in cases where leave is required, within six weeks after the date of an order granting leave to appeal;
- (b) in all other 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 months after an order granting the leave to appeal; or
- (c) within such further period as may be agreed to in writing by the respondent.'

<sup>4</sup> 2013 (4) NR 1029 (SC) at 1031C-1032A.

<sup>5</sup> 1990 (4) SA 271 (A).

[19] In *Aymac CC and Another v Widgerow*,<sup>6</sup> also referenced with approval in *Kleynhans* above, Gautschi AJ at 450H-I stated:

“[36] . . . An attorney is not expected to know all the rules, but a diligent attorney will ensure that he researches, or causes to be researched (by counsel if necessary), the rules which are relevant to the procedure he is about to tackle. And if he discovers at some stage that he has been mistaken or remiss, then it is doubly necessary that he study the rules carefully in order to ensure that further mistakes are not made, and that those that have been made are rectified. This is the least one expects of a diligent attorney.”

[20] At 451I-452A Gautschi AJ continued to say:

“[39] Culpable inactivity or ignorance of the rules by the attorney has in a number of cases been held to be an insufficient ground for the grant of condonation. See *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121C-122C. The principle established by these cases is that the cumulative effect of factors relating to breaches of the rules by the attorney may be such as to render the application for condonation unworthy of consideration, regardless of the merits of the appeal.”

[21] The principles above find application in this case. ‘It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation . . . . “an application for condonation is not a mere formality”.’<sup>7</sup>

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<sup>6</sup> 2009 (6) SA 433 (W).

<sup>7</sup> Footnote 2 above at 639H-J.

[22] In my opinion the legal practitioner offers no explanation at all for her remissness in filing the record late. She failed to file the record within the time agreed upon with the respondent. She even failed to file the record within the time she created outside the rules, ie from the time she filed notice to appeal to about 12 July 2018. The failure to offer an explanation for delay persisted in the amended notice of motion of 9 September 2019. All that she said in that notice is that 'it is my humble submission that our client will be greatly prejudiced if the condonation explanation is not accepted and upheld and that would result in a miscarriage of justice.' Then she went on to refer to Art 16(2) of the Constitution of Namibia<sup>8</sup> and contended that the respondent failed to compensate the appellant and therefore it means that the immovable property has not been expropriated and that the respondent was not the lawful owner of the immovable property.

[23] In summary, as I have already said, she made no explanation at all or failed to convince this court that there is sufficient cause to warrant the grant of condonation. It is settled law that, whilst an appellant should not be prejudiced by his or her legal attorney's incompetence, there is a degree beyond which a litigant cannot be excused thereby.<sup>9</sup> In *Saloojee and Another NNO v Minister of Community Development*,<sup>10</sup> Steyn CJ at 141D-E puts it thus:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of

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<sup>8</sup> 'The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament'.

<sup>9</sup> Footnote 6 above at 451D, para 38.

<sup>10</sup> 1965 (2) SA 135 (A).

diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”

[24] The appellant’s or his legal practitioner’s explanation for the delay in filing the record has no sufficient cause to warrant the grant of condonation and reinstatement of the matter. Given the fact that the notice of appeal was filed out of time and there is no condonation application in that regard, there is no appeal before us. This is a matter where, because of the flagrant disregard of the rules, it is unnecessary to consider the prospects of the success, but for the contentions made on the prospects of success, I would consider prospects and briefly so.

[25] The legal practitioner relies on Art 16(2) of the Constitution of Republic in the amended notice of motion and heads of argument to suggest and contend that the respondent expropriated appellant’s land without having paid him compensation, which means the immovable property was not expropriated and that the respondent was not the lawful owner of the property.

[26] Article 16(2) does not find application in this case. Article 16(2) finds application where the immovable property is owned. Appellant did not or does not

own that portion of land in Omatando area. He might have a customary land right in terms of the CLRA, which is the next question I need to consider.

[27] The legal practitioner acknowledges that Omatando area was withdrawn from the Communal Land in terms of the LAA by the Minister of Regional and Local Government, Housing and Rural Development by Government Notice No 238 published in Government Gazette No 5038 of 14 September 2012, but she contended that withdrawal was an attempt, as respondent did not acquire all the rights held by the appellant under s 16(1)(c)<sup>11</sup> of the CLRA as it failed to pay the appellant just compensation for the acquisition of the right to the land. She further contended that the appellant is the lawful owner of the land in question and has a right and reason to construct any structure on the property.

[28] The acquisition of land rights in communal areas is now regulated by the CLRA. The purpose of the Act is to provide for the allocation of rights in respect of communal land; to establish Communal Land Boards; to provide for powers of Chiefs and Traditional Authorities and boards in relation to communal land; and to make provision for incidental matters.

<sup>11</sup> **'Establishment of new communal land areas and additions to or subtractions from communal land areas**

16. (1) The President, with the approval of the National Assembly, may by proclamation in the *Gazette*,-

- (a) declare any defined portion of unalienated State land to be communal land area;
- (b) incorporate as part of any existing communal land area any defined portion of unalienated State land; or
- (c) withdraw from any communal land area, subject to the provisions of subsection (2), any defined portion thereof which is required for any purpose in the public interest,

and in such proclamation make appropriate amendments to Schedule 1 to this Act so as to include the description of any new communal land area declared under paragraph (a) or to redefine any communal land area affected by any change under paragraph (b) or (c).'

[29] Section 16(1)(c) of the CLRA provides that the President with the approval of the National Assembly, may by proclamation in the Gazette withdraw from any communal land area, subject to the provisions of subsection (2) any defined portion thereof which is required for any purpose in the public interest. The legal practitioner contended that no communal land can be withdrawn without parliamentary authorisation. She further relies on s 16(2) which provides that:

‘(2) Land may not be withdrawn from any communal land area under subsection (1)(c), unless all right held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned.’

[30] The reliance on s 16(1)(c) is misplaced for the land in dispute was withdrawn from the communal land area in terms of s 4(1)(b) of the LAA. So is the reliance on s 16(2). Once the boundaries of Ongwediva Town Council were extended by proclamation to engulf Omatando area within its boundaries, the State acquired all the rights of the residents of that area as provided for by s 16(2). Section 16(3) further provides that the compensation payable to a person in terms of subsection (2) must be determined-

- a) by agreement between the Minister and the person concerned; or
- b) failing such agreement, by arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965).

[31] Section 16(4) in my opinion makes the provisions of s 16 even more clearer, when it provides that, 'Any portion of a communal land area withdrawn under subsection (1)(c) ceases to be communal land and becomes available for disposal as State-owned land.'

[32] This being the state of the law, there can be no doubt that Omatando area is State-owned land.

[33] It was contended that appellant acquired customary land rights to that portion of the land in dispute. Appellant relies for this assertion on a letter of approval for the allocation of land by headman Mr Johannes Mulongeni. The difficulty with this argument is that s 20 of the CLRA vests the power to allocate and cancel customary land rights in the Chief of the traditional community, or where he so determines, in the Traditional Authority of that traditional community.

[34] There is no evidence before us that headman Mulongeni had authority to allocate land. Even if we were to accept that he had authority to allocate land by virtue of the definition of Traditional Authority which means 'a Traditional Authority of which the traditional leaders have been recognised under the Traditional Authorities Act, 2000', appellant's argument on that score still has some obstacles in that s 24(1) provides that 'any allocation of a customary land right made by a Chief of a traditional authority under section 22 has no legal effect unless the allocation is ratified by the relevant board in accordance with the provisions of this section.'



[35] No such ratification was made available to the court. This follows necessarily that appellant has no prospects of success on the merits of this case and condonation should be refused.

[36] In the result I make the following order:

1. Condonation is refused with costs.
2. The matter is struck from the roll.

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**MAINGA JA**

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**MOKGORO AJA**

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**NKABINDE AJA**

APPEARANCES:

Appellant:

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Respondent:

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