



REPORTABLE

CASE NO: SA 15/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HALLIE INVESTMENT NUMBER TWO HUNDRED AND

TWENTY-TWO CC t/a SPUR

PATRICK KAUTA

and

TSUMEB MALL (PTY) LTD

First Appellant

Second Appellant

Respondent

Coram: DAMASEB DCJ, MAKARAU AJA and PRINSLOO AJA

Heard: 5 July 2024

Delivered: 13 December 2024

Summary: This appeal concerns an appeal against the whole of the judgment and orders of court *a quo*, which was delivered on 14 February 2022. In the court a

quo the respondent instituted proceedings the appellants for breach of a lease agreement concluded between the parties. The crux of the matter *a quo* emanates from the appellants' failure to timeously file their witness statements as directed by the court. The appellants then brought a condonation application for their non-compliance, the condonation was granted, and the appellants were ordered to file their witness statements on a specific date, however, the appellants once again failed to comply. Resultantly, the appellants were directed to file a sanctions affidavit showing cause why their pleadings should not be struck from the roll. Once again, the appellants failed to timeously file their sanctions affidavit as directed by the court *a quo* and sanctions were imposed which left the pleadings of the appellants struck from the roll.

Subsequently, the appellants filed a rescission application in the court *a quo*, which was dismissed and ultimately, the court *a quo* granted default judgment against the appellants.

The appellants launched this appeal against the whole of the judgment and orders of the court *a quo* which was delivered on 14 February 2022. However, the appeal was noted late, and security for costs was furnished late. The appellants filed a condonation application for the late filing of the appeal and belated furnishing of security for costs and sought to have their appeal reinstated.

Held that, in terms of rule 7(6) of the Rules of Court the legal practitioner acting on behalf of the appellants had to file a power of attorney within 21 days from the date of filing the appeal authorising him or her to prosecute the appeal.

Held that, it is trite that the condonation application must be brought as soon as the non-compliance is detected.

Held that, in terms of rule 17(1) and (2) of the Rules of Court the appellants must file their heads of argument no later than 21 days before the hearing, failing which the appeal shall lapse.

Held that, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide the condonation application without having regard to the prospects of success on appeal.

Held that, the appellants' failure to comply with the rules, specifically rule 17, is fatal to the appellants' appeal.

Consequently, the application for condonation and reinstatement of the appeal is refused and the appeal is struck from the roll.

APPEAL JUDGMENT

PRINSLOO AJA (DAMASEB DCJ and MAKARAU AJA concurring):

Introduction

[1] The appeal before us is the result of a lengthy and untidy litigation process that began in 2016. This case has been marked by numerous interlocutory applications and instances of non-compliance. Ultimately, it was concluded with the granting of a default judgment after the defence of the first appellant was struck out.

[2] Unfortunately, the appellants' non-compliances did not end in the court below, and they followed the appellant to this Court, resulting in yet another condonation application.

Background

[3] In this brief introduction, I aim to outline the background of the matter as it has progressed through the judicial case management process and the facts that escalated the matter to the current appeal.

[4] The respondent, the plaintiff in the court *a quo*, instituted an action against the appellants, the defendants in the court *a quo*, in March 2016 for the payment of two claims, ie:

(a) Confirmation of the cancellation of a lease agreement and payment of outstanding rental in the amount of N\$472 230,86; and

(b) Claim for damages resulting from the defendant's breach of the lease agreement, amounting to N\$1892.44 per day as of 1 March 2016, with an annual escalation of 6% from 1 October 2016, until the premises are re-let or until the lease agreement expired on 30 September 2019.

[5] In January 2017, the appellants consented to judgment with respect to the first claim in the amount of N\$472 230,86.

[6] During the process of judicial case management, the appellants were ordered to file their witness statements on or before 30 November 2017. The appellants, however, failed to comply with the order as directed by the court *a quo*. The witness statements were only filed on 8 December 2017. On 14 December 2017, the Managing Judge ordered the appellants to file an application for condonation on or before 5 February 2018. No application for condonation was filed and the court *a quo* postponed the matter for a sanctions hearing to 28 March 2018. The appellants were directed to show cause, on affidavit, why the 14 December 2017 court order was not complied with and why sanctions should not be imposed in terms of rule 53 of the rules of the High Court.

[7] On 28 March 2018, the appellants were relieved from sanctions for their non-compliance with the court order of 14 December 2017. They were again ordered to file their witness statements. As the appellants again failed to comply with the court order, the court *a quo* on 6 June 2018 scheduled a further sanctions hearing for 1 August 2018 with the following directions:

- ‘1. The Defendants are to file a sanctions affidavit on or before 27 July 2018 explaining reasons for their failure to comply with the court order dated 28 March 2018 (failure to file Defendant’s witness statements on or before 18 May 2018) and showing cause why sanctions contemplated under Rule 53(2) should be imposed.
2. The case is postponed to 1 August 2018 at 15:15 for a sanctions hearing.’

[8] On 1 August 2018, the Judge *a quo* recorded the following:

'In the absence of both parties and having read the documents filed of record in chambers:

IT IS RECORDED THAT:

By court order dated the 28 February 2018 the Defendants were ordered to file their witness statements on or before the 18 May 2018. The Defendants did not do so. The Defendants also did not apply for condonation for the non-compliance with the court order dated 28 February 2018. By court order dated 06 June 2018, the Defendants were directed to file a sanctions affidavit on or before the 27 July 2018. The Defendants did not do so. Instead the Defendants filed a sanctions affidavit on 31 July 2018. No reasons have been furnished for this non-compliance and no condonation application has been filed in this respect. From the sanctions affidavit, it is clear that the Defendants were aware as of mid-April 2018 that they would not be in position to meet the 18 May 2018 deadline, yet they did not apply for extension of time. In the explanation furnished, no indication is given as to when the Defendants would be in position to file their witness statements. All in all, the court is not satisfied with the explanation given by the Defendants, and the undermentioned sanctions are imposed.

IT IS ORDERED THAT:

1. The pleadings, including the defence, filed by the Defendants are hereby struck out in terms of rule 53(2)(b).
2. The counterclaim filed by the 1st Defendant is dismissed in terms of Rule 53(2)(c), with costs.
3. The Plaintiff is directed to file a damages affidavit on or before 18 October 2048, in proof of its claim as set out in claim "B" of the particulars of claim, as well as file a draft order for the relief that the Plaintiff prays for.
4. The matter is postponed to 24 October 2018 at 15:15 for hearing the Plaintiff in respect of the relief they seek.'

[9] The appellants brought an application for relief from sanctions, which application was heard on 28 March 2019 and the judgment was delivered on 21 June 2019 in the following terms:¹

- '1. The defendants' application for relief from sanctions, imposed by this court on 01 August 2018, is hereby dismissed.
2. The defendants are ordered to pay jointly and severally the one paying the other to be absolved, the costs of the plaintiff occasioned by this application, such costs are to include costs of one instructing and one instructed legal practitioner.
3. The matter is postponed to 31 July 2019 for purposes of making such orders as appropriate for the just and speedy disposal of the case.
4. The party/parties are directed to file a status report on or before 25 July 2019.'

[10] The appellants lodged an appeal to this Court on 5 September 2019, but the appeal was withdrawn on 23 April 2021. Due to the appeal having been withdrawn, the appellants' pleadings remained struck out, and the counterclaim remained dismissed. The respondent applied for default judgment against the appellants. However, before the default judgment application could be heard, the appellants launched an application seeking leave to file their witness statements, expert summary, and expert report as per their notice of motion dated 19 August 2021.

¹ *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty-Two* (I724/2016) [2019] NAHCMD 201 (21 June 2019).

[11] In the founding affidavit deposed to by the second appellant, the appellants indicated that the application was, in fact, an application in terms of rule 103(1)(c) of the rules of the High Court, alternatively the common law, for the rescission of the court orders dated 6 June 2018 and 1 August 2018, as well as the subsequent judgment of 21 June 2019, on the basis that the judgment was entered without the court having the necessary jurisdiction to do so and are thus nullities in law.

[12] More specifically, the appellants before the court *a quo* challenged those orders by contending that the court *a quo* did not have the necessary competence and jurisdiction to order sanctions pursuant to the provisions of rule 53(1) once it is established that the automatic sanctions provided for in rule 93(5) find application to the facts. The appellants contended that the effect of failing to file a witness statement within the time specified by the court by virtue of a court order is that the witness may not be called to give oral evidence, which constitutes an automatic sanction. Yet the rule contemplates that a litigant may show good cause to be permitted by the court for such a witness to give oral evidence despite a witness statement not having been served timeously in respect of that witness.

[13] The appellants contended that the imposition of sanctions for failure to file a witness statement timeously constitutes a pre-judgment of the court's power to exercise such discretion and that it is not within the contemplation of rule 93(5).

[14] The appellants raised other issues before the court *a quo* as well, which were *inter alia* the following:

- (a) The evidence proffered by the respondent in the witness statements was inadequate to sustain its claim;
- (b) The unfairness of allowing the respondent to file an additional affidavit to buttress its claim after the appellants' defence was struck and;
- (c) The orders dated 6 June 2018, 1 August 2018 and 21 June 2018, being interlocutory orders in nature, were vitiated by an error of law.

[15] A different Judge *a quo* heard the appellants' application on 24 January 2022, and the judgment was delivered on 14 February 2022, with the reasons delivered on 18 February 2022.²

[16] The court *a quo* ordered as follows:

'1. The application for rescission is hereby dismissed.

2. Part B of the claim is granted as follows:

2.1 Payment in respect of damages in the amount of N\$ 2 735 949,76.

2.2 Interest at 2% per annum above the prime lending rate from time to time.

² *Tsumeb Mall (Pty) Ltd v Hallie Investment Two Hundred and Twenty Two CC t/a Spur* (I 724/2016) NAHCMD 66 (14 February 2022).

3. Cost of suit on an attorney and client scale, including the cost of one instructed and one instructing counsel.
4. The matter is removed from the roll and regarded as finalized.'

The proceedings in the court *a quo*

[17] The learned Judge *a quo* predominantly dealt with the issues of rescission and jurisdiction in her judgment. She pointed out that although the issues raised under para [14] above were raised on the papers, they were not argued before her.

[18] The Judge held that regardless of whether the application for rescission was brought in terms of rule 103 of the rules of the High Court or the common law, such an application had to be brought within a reasonable time. In the present matter, more than three years had passed before the application for rescission was brought in relation to the disputed orders, and more than two years had passed in relation to the judgment refusing the application for relief from sanctions, and for that reason alone the application stood to be dismissed.

[19] The learned Judge further considered the orders along with the judgment from 1 August 2019, refusing the application for relief from sanctions, and concluded that the orders were neither ambiguous nor contained any apparent errors or omissions. She concluded that the orders did not meet the criteria for the interference as envisaged by rule 103(1)(c) of the rules of the High Court.

[20] On the issue of whether the court *a quo* had the jurisdiction to make the orders that it did, the Judge held that the doctrine of continuance of jurisdiction applies. Thus, once established, jurisdiction remains vested in the court until the end of the proceedings.

[21] The learned Judge further held that the provisions of rule 93(5) do not apply when there is a breach of a court order as it is regulated by Chapter 6 of the rules of the High Court, which deals with non-compliance as a whole, even if it relates to the non-filing of witness statements. The learned Judge opined that there is a distinction between failing to comply with a court order and sanctions being imposed in terms of rule 53, striking defence and pleadings of the defendant, and a situation where a litigant is barred from filing witness statements. Rule 93(5), in the view of the learned Judge, prescribed sanctions in a situation where there is a witness statement before the court for use at trial, which was not served within the time specified by the court and with respect to which a party wishes to call a witness to give oral evidence.

[22] The appellants dissatisfied with the judgment noted an appeal against the whole of the judgment and orders rendered by the court *a quo* on 14 February 2022.

Application for condonation and reinstatement of appeal

[23] The second appellant deposed to the founding affidavit filed in support of the condonation application seeking the following relief:

- ‘1. Condoning the Appellants’ non-compliance with Rule 8(2) and Rule 11(10)(a) and (b) of the Rules of the Honourable Court.
2. Condoning the late filing of the record of proceedings and reinstating the appeal.
3. Further and/or alternative relief.’

[24] To provide context for the condonation application, the second appellant explained that the appeal record needed to be filed within three months of the judgment date, i.e. by 16 May 2022. After receiving the notice of appeal from counsel, his legal representative – whose name is not identified – sent an email to one Ms Basson, a legal secretary at the firm. In this email, he/she instructed her to prepare the notice of appeal for filing, along with a special power of attorney and a bond of security for N\$150 000. Additionally, Ms Basson was tasked with confirming whether the appeal was filed late. If it was, she was to brief counsel to draft a condonation application.

[25] The appellants’ legal practitioner further informed Ms Basson that the record should be filed within three months and that there is already a record of proceedings which could merely be updated.

[26] At this point, I must interpose and point out that Ms Mercy Kuzeeko, a legal practitioner and director at Dr Weder, Kauta & Hoveka, deposed to a confirmatory affidavit verifying the founding affidavit of the second appellant as far as it relates to

her. This is done despite the fact that Ms Kuzeeko is not referred to by name in the founding affidavit. Throughout the founding affidavit, reference is made to 'my legal representative', and it is therefore not clear what Ms Kuzeeko confirmed or verified.

[27] On 18 May 2022, Ms Basson informed the legal practitioner that while attending to the court file to prepare the record of proceedings, which she believed was due on 15 June 2022, she noticed that the bond of security and the power of attorney were still in the office file and had not been filed with the Registrar of the Court as instructed. Ms Basson was accordingly to file the bond of security and power of attorney, which was filed on 19 May 2022.

[28] On the same date, the appellants' legal representative also addressed correspondence to the respondent's legal practitioner in terms of rule 11(10) regarding the appeal record. In response, his legal representative received a letter from the respondent's legal practitioner informing that the appeal record should have been filed on 14 May 2022 already (alternatively, 18 May 2022 as the reasons of the court *a quo* were released on 18 February 2022), and they sought confirmation that the appeal was withdrawn.

[29] Upon enquiries, Ms Basson clarified that she believed the record of proceedings was only required to be submitted by 15 June 2022, which is three months after the notice of appeal was filed. As a result, she had not noted it in her calendar earlier.

[30] The record of proceedings was thereafter prepared with haste and filed with the condonation application on 13 June 2022.

[31] I just need to pause for a moment to point out that although the appellants sought condonation for the non-compliance with rules 8, 11(10)(a) and (b) of the rules, the appellants are not seeking condonation for the late filing of the power of attorney, which should have been filed within 21 days after filing the notice of appeal in terms of rule 7(6). It appears that a power of attorney was only filed on 19 May 2022, which is well beyond the required date of filing.

[32] The appellants contended in their founding affidavit that the appeal concerns the interplay between rules 93(5) and 53(1) of the High Court rules and the court *a quo* misdirected itself when it failed to appreciate the jurisdiction and competence of the High Court as raised by the appellants. The appellants further contended that the prospects of success are set out in the grounds upon which the appeal is based. The appellants essentially replicated their grounds of appeal in support of the contention of prospects of success.

[33] Further, in support of their condonation application, the appellants contended that the respondent would suffer no prejudice in the event that the condonation is granted. According to the appellants, this cannot be compared with the prejudice that the appellants would suffer in the event that condonation is not granted. The

appellants urged this Court to grant the condonation sought and reinstate the appeal, even if the explanation is not perfect.

[34] The respondent opposed the application for condonation and pointed out that this Court has repeatedly warned that failure to comply with the rules of Court delays the finalisation of appeals and disrupts the administration of justice and the functioning of the court. In this regard, the court was referred to *Katjaimo v Katjaimo & others*.³

[35] The respondent denies that the appellants' explanation for the failure to comply with the rules of Court is a 'full, detailed and accurate' explanation. It was submitted that, firstly, the appellants were due to file the record at the latest at 17 May 2022 but failed to do so and also failed to arrange an extension of time with the respondent in terms of rule 8(2)(c) of the rules. Secondly, the second appellant, who is a senior legal practitioner and the instructing legal practitioner elected to leave the most critical part of the appeal for a legal secretary, ie the calculation of the period for the filing for the appeal and the compiling of the record itself.

[36] It was also stated that the second appellant and the legal practitioner were so disengaged from the appeal process that they believed the record of proceedings was due on 15 June 2022.

³ *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 34.

[37] From the founding affidavit, it is clear that but for the single instruction via email to Ms Basson on 14 March 2022, nothing further was done to ensure that the appeal was properly prosecuted from 14 March 2022 to 24 May 2022. Ms Basson was only informed on 24 May 2022 'to have the record of proceedings prepared'.

[38] The respondent further argues that the appellants did not submit the condonation application promptly after they became aware of the non-compliances, as the application was filed approximately three weeks after the need to do so arose.

[39] According to the respondent, this is the trend of the litigation to date and what caused the respondent's claim to remain unsatisfied for eight years. This would continue if the appellants succeeded in getting the matter referred back to the High Court.

[40] The respondent believes that the appellants have no prospect of success in their appeal and that the condonation application should be refused.

[41] The oral arguments presented by both parties before the court were primarily based on the written heads of argument filed in the record, and therefore need not be reiterated herein.

The applicable legal principles

[42] The law concerning applications for condonation is well-established and not in dispute in this case. The main issue at hand is whether the appellants have demonstrated a sufficient case to warrant the indulgence they are seeking. For the purpose of this application, it is important to emphasise that condonation is a privilege granted at the court's discretion. It is not something that can be obtained simply by asking, nor is it a mere formality.⁴

[43] The position was succinctly set out in *Arangies t/a Auto Tech v Quick Build*⁵ when O'Regan AJA stated as follows:

‘[4] As this Court has recently held:

“An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. The jurisprudence of both the Republic of Namibia and South Africa indicate that a litigant is required to apply for condonation and to comply with the Rules as soon as he or she realises there has been a failure to comply.”⁶

[5] The application for condonation must thus be lodged without delay, and must provide a “full, detailed and accurate” explanation for it.⁷ This Court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –

⁴ *De Wet v Klein* 2023 (4) NR 1166 (SC) para 22.

⁵ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5.

⁶ *Beukes & another v SWABOU & others* [2010] NASC 14 (5 November 2010) para 12.

⁷ *Ibid* para 13.

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent’s (and where applicable, the public’s) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.”⁸

These factors are not individually determinative, but must be weighed, one against the other.⁹ Nor will all the factors necessarily be considered in each case. There are times, for example, where this Court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been “glaring”, “flagrant” and “inexplicable”.¹⁰

[44] The sentiments expressed by the Chief Justice in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others*,¹¹ with reference to condonation applications, ties perfectly in to what was held in *Arangies supra*, when he said that:

‘In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent’s interest in the finality of the judgment; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.’

⁸ See *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* [2012] NASC 21 (25 October 2012) para 68.

⁹ *Ibid.*

¹⁰ *Beukes & another v SWABOU* cited at footnote 6 para 20.

¹¹ *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) para 28.

Discussion

[45] Not only are the current non-compliances part of a long list of previous non-compliances, but they necessitate yet another condonation application.

[46] This condonation application follows the late filing of the record, which should have been filed on 17 May 2022 in compliance with rule 8(2)(b) of the rules of Court and rule 11(10)(a) and (b).

Late filing of the record

[47] The record of appeal had to be filed three months from the date of judgment. The judgment of the court *a quo* was delivered on 14 February 2022 and the reasons were released on 18 February. The record, therefore, had to be filed, at the latest, on 18 May 2022.

[48] The respondent provided valid criticism of the appellants' justification for their late filing of the record, which was apparently due to a legal secretary's oversight.

[49] In para 50 of their heads of arguments, the appellants stated that 'the record was not filed timeously because the secretary that was instructed to prepare the record of proceedings miscalculated the timelines for filing as she was under the impression that the record was due to be filed within three months of the notice of appeal and not within three months of date of judgment as required by the rules of this Honourable Court'.

[50] This statement does not appear to be factually correct. It is clear from the emails attached to the condonation application that Ms Basson was advised in the email dated 14 March 2022 apparently by Ms Kuzeeko to prepare the record for filing and she further indicated that the record must be filed within three months. Clearly, Ms Kuzeeko lost sight of the fact that when she gave the email instructions to Ms Basson that the 21 days within which the appeal had to be filed had already passed, causing the time for the filing of the record to be reduced from three months to approximately two months.

[51] It is clearly incorrect to say that Ms Basson made a miscalculation with the timelines for the filing of the record. I find it objectionable that the blame for the late filing of the record was placed at the door of a legal secretary, incorrectly so.

[52] The email about preparing the record was the only communication Ms Basson received from the legal practitioner. She did not receive any further instructions or guidance until she noticed that the power of attorney and the bond of security had not been filed. Even then, the legal practitioner failed to realize that the record filing was overdue.

[53] Apart from the email dated 14 March 2022 the appellants did not submit appellants and their legal practitioner did nothing ensure the proper prosecution of the appeal.

[54] In *De Klerk v Penderis & others*,¹² this Court was faced with an explanation in support of a condonation application, which was not dissimilar from the current facts. In the condonation application service before the court in *Penderis*, the appellant shifted the blame for his non-compliance to the transcription company. Angula AJA, writing for this Court, found that this shifting of blame demonstrated the appellant's lack of bona fide and forthrightness. What the learned Judge further stated is important for purposes of the current matter. He stated that:¹³

'It is well-settled that the responsibility for the preparation of the appeal record rests on the appellant and his or her legal practitioner. Such responsibility cannot be outsourced to the transcription company. In my view, the self-admitted fact that the legal practitioner failed to notice that volume 6 of the record exceeded the prescribed number of pages demonstrates the lack of attention and diligence on the part of the appellant's legal practitioner to ensure that rule 11(3) had been complied with. Such conduct cannot be countenanced by this court.' (Emphasis supplied).

[55] I fully agree with the views of the learned Judge, on the responsibility of legal practitioners and the preparation of appeal records. This is not a duty of which a legal practitioner can wash his or her hands like the biblical Pontius Pilate. In my opinion, the appellants' explanation is untenable and demonstrates a clear lack of diligence on the part of the appellants and their legal practitioner.

[56] Over and above the duties of the legal practitioners set above, I am of the view that the excuse of miscalculation of days for filing of record, in this Court, is coming

¹² *De Klerk v Penderis & others* 2023 (1) NR 177 (SC).

¹³ *Ibid* para 44.

more and more to the fore. In the recent judgment of *Municipal Council of Windhoek v Bahr*,¹⁴ the issue of miscalculation was again raised and Smuts JA, writing for the Court, again stressed that the duty of legal practitioners undertaking of assigned work in this Court to take time to study the rules and apply them correctly. I make common cause with this remark.

Failure to comply with rule 11(10)(a) and (b)

[57] Rule 11(10)(a) and (b) provides that:

‘(10) Parties to an appeal or their legal practitioners, if they are represented, must-

(a) within 20 days of the noting of the appeal, hold a meeting about the record with the view to eliminating portions of the record which are not relevant for the determination of an issue on appeal; and

(b) within 10 days of conclusion of that meeting submit to the registrar a written report about the meeting.’ (Emphasis supplied).

[58] Ms Kuzeeko addressed a letter to the respondent’s legal practitioner apparently in compliance with rule 11(10) on 19 May 2022. This was months after the noting of the appeal. No explanation is advanced for the clear non-compliance of the rule.

Late filing of the power of attorney

¹⁴ *Municipal Council of Windhoek v Bahr* (SA 49/2022) [2024] NASC (14 November 2024) para 86. Also see *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others* 2013 (4) NR 1029 (SC) at 1031D-E.

[59] As indicated earlier in the judgment, the appellants only filed the power of attorney and the bond of security on 19 May 2022, after Ms Basson discovered these documents still in the office file.

[60] In terms of rule 7(6) the legal practitioner acting on behalf of the appellants had to file a power of attorney within 21 days from the date of filing the appeal authorising him or her to prosecute the appeal.

[61] Unfortunately, yet again, no explanation by the appellants was advanced for the late filing of the power of attorney and the failure to seek condonation.

Delay in filing the condonation application

[62] When the omission in filing the record timeously came to the attention of the appellants and their legal practitioner, there was no immediate action on their part to seek condonation for the non-compliance. The application for condonation was only filed some three weeks later with the record of proceedings. Again, no explanation was advanced for the delay in bringing the condonation application.

[63] It is trite that the condonation application must be brought as soon as the non-compliance is detected. This, in my view, was not done.

[64] The appellants adopted a lackadaisical approach not only to the litigation in the court *a quo* but also in this Court, and this conduct is unacceptable.

Further non-compliance

[65] The culmination of the appellants' non-compliance became evident during the hearing of the appeal. It was highlighted during the respondent's oral submissions that the appellants submitted their heads of argument late and, according to the record reviewed, the appellants did not request condonation for this specific instance of non-compliance.

[66] When the respondent pointed out the short filing of the heads of arguments, it was evident that the appellants' counsel was caught off guard. However, the non-compliance was acknowledged, and counsel left the decision on this matter to the discretion of the Court.

[67] In terms of rule 17(1) and (2) of the rules of Court, the appellants had to file their heads of argument within 21 days before the hearing, failing which the appeal shall lapse.

[68] From the record, it is clear that the appellants' heads of argument were filed on 7 June 2024, which is 20 days before the date of the appeal hearing. At first glance, the appellants' heads of argument appear to be in time. However, the calculation of filing of heads of argument has been made clear in *Kamwi v Law Society of Namibia & two similar cases*¹⁵ wherein Shivute CJ discussed it as follows:

¹⁵ *Kamwi v Law Society of Namibia & two similar cases* 2023 (4) NR 925 (SC).

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

[27] This Court in *Metropolitan Bank of Zimbabwe Ltd v Bank of Namibia*,¹⁶ para 11, held that rule 17, as understood by legal practitioners and applied by this Court, has always been that an appellant's heads of argument must be filed no later than 21 days before the date of the hearing and a respondent's heads are to be filed no later than 10 days before the hearing. This is the true import and scope of the rule and the argument by the applicant that he could file his heads of argument even a day before the hearing of an appeal is clearly wrong as such practice would severely prejudice the court and a party in the preparation of an appeal and cannot therefore be countenanced. It follows that the applicant has not given a satisfactory and acceptable explanation for the failure to comply with the rules of court.'

[69] Having said that, I must hasten to say that there was no attempt on the part of the appellants to present an argument contrary to the interpretation of the rules as set out by this Court above, and the concession made on behalf of the appellants is appreciated.

¹⁶ *Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia* 2018 (4) NR 1115 (SC).

Prospects of success

[70] As pointed out earlier in this judgment, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide the condonation application without regard to the prospects of success on appeal.

[71] Given the turn of events for the appellants, it is clear that for all intents and purposes, the appellants, as a result, do not have a live appeal before this Court. Their effort to rescue the appeal at this late stage is inadequate. The argument made by the appellants' counsel, stating that the appeal raises an important issue concerning the interaction between rules 53 and 93(5), might be of limited relevance due to the serious shortcomings in the appellants' appeal.

[72] I fully agree that these are important issues to consider, but I also hold the view that the current matter is not one wherein these issues need to be decided.

[73] I am of the view that the appellants' failure to comply with the rules, specifically rule 17, is fatal to the appellants' application appeal. I am further of the view that the cumulative effect of the appellants' multiple non-compliances with rules falls within the ambit of what the Court in *Arangies*¹⁷ referred to as 'so glaring, flagrant and inexplicable' that this Court can decide the condonation application without considering the prospects of success.

¹⁷ *Arangies t/a Auto Tech v Quick Build supra* at footnote 4.

Costs

[74] The normal rule is that costs follow the result. I cannot see any reason why that rule should not apply to the present appeal.

The order

[75] In the result, I make the following order:

- (a) The application for condonation and reinstatement is refused and is struck from the roll.
- (b) The appellants are to pay the costs of the respondent. Such costs to include the costs of one instructing and one instructed legal practitioner.

PRINSLOO AJA

DAMASEB DCJ

MAKARAU AJA
APPEARANCES

APPELLANTS:

G Narib

Instructed by Dr Weder, Kauta & Hoveka Inc

RESPONDENT:

G Dicks

Instructed by Etzold-Duvenhage