B'L

54/89
Box 89(2)

Case No 333/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

J M MORALISWANI Applicant

and

R M MAMILI Respondent

CORAM: HOEXTER, HEFER, E M GROSSKOPF, MILNE, EKSTEEN, JJA

HEARD: 3 May 1989

HANDED IN: 17 May 1989

REASONS FOR JUDGMENT

E M GROSSKOPF, JA

The petitioner's application for condonation of the late furnishing of security for the respondent's costs of appeal was dismissed with costs on 3 May 1989, and we intimated that the Court's reasons would be furnished later. These reasons now follow.

The petitioner is the chief of the Basubia tribe in the Caprivi Zipfel in South West Africa. He was the plaintiff in an action in the Supreme Court of South West Africa in which he claimed the following substantive relief:

> "A declaratory order declaring that
> 1.1 The Plaintif is the 'Munintenge', being the Supreme Chief of the tribes and inhabitants of the Caprivi Zipfel.
> 1.2 The Plaintiff be regarded as the owner and/or custodian and/or controller of all communal land in the Caprivi Zipfel."

The particulars of claim are dated 18 April 1983.

The defendant, who was the chief of the Mafwe tribe in the Caprivi Zipfel, contested the action and asked in his plea that the plaintiff's claims be dismissed with costs. In addition be counterclaimed for an order declaring, inter alia,

a) that a demarcation line existed between the areas of authority of the plaintiff and the defendant, consisting of a series of straight lines between certain beacons, and,

b) that the defendant was entitled to exercise exclusive

authority in the area lying east of the Kavango river of that part of the territory of South West Africa known as the Caprivi Zipfel, and west of the demarcation line referred to in (a) above.

For convenience I shall continue referring to the parties as plaintiff and defendant respectively.

After close of pleadings the matter was set down for trial on 5 March 1985. On that date the parties, by agreement, requested the court to decide the following issue in limine "as if on exception":

"Inasmuch as it is agreed that:

a) The plaintiff has not been appointed or recognised as chief or headman of the Mafwe tribe in terms of the relevant legislation;

b) Neither the plaintiff nor any other person has been appointed or recognised as 'Munitenge' or Supreme Chief in terms of the said legislation;

c) no tribal boundary has been defined in terms of the said legislation in respect of either the Basubia or Mafwe tribe,

can this Honourable Court grant the relief sought by

the plaintiff in the event of his establishing that he is the 'Munitenge' of the said tribes, and of the other inhabitants of the Caprivi, in the sense set out in the particulars of claim (as amplified by the Further Particulars thereto), and the owner and/or custodian and/or controller of all communal land in the Caprivi in terms of the customary laws and traditions of the inhabitants of the Caprivi?".

The court (STRYDOM J) agreed to decide this point in limine, and the point was then argued on the basis of the pleadings and certain agreed historical facts. The court was also provided with a bundle of legislation applying to the Caprivi Zipfel, which, for reasons on which I need not elaborate, is rather involved. On 12 June 1985 STRYDOM J, in a well-reasoned judgment, decided the point in limine as follows:

"(a) Defendant's exception against the plaintiff's claim to be declared the supreme chief of the tribes and inhabitants of the Caprivi is upheld.

(b) Defendant's exception against the plaintiff's claim to be declared as the owner and/or custodian and/or controller of all communal land in the Caprivi Zipfel is dismissed.

(c) Plaintiff is ordered to pay 60% of the defendant's costs of exeption.

(d) Plaintiff is given leave to amend his pleadings, if so advised, within 14 days."

This order did not, of course, dispose of all the matters in dispute between the parties. Although an important issue was decided, others were still unresolved and would in the normal course have been determined at the trial. However, the plaintiff applied for leave to appeal to the Appellate Division against orders (a) and (c) and this was granted on 12 November 1985. A notice of appeal was lodged on 25 November 1985. Although this notice purported to apply to the "whole of the judgment and orders (including the order as to costs)" nothing turns on this inaccuracy.

The next step which should have been taken by the plaintiff in the prosecution of his appeal was the entering into of "good and sufficient security for the respondent's costs of appeal" pursuant to AD Rule of Court 6(2). This was to be done before lodging with the registrar copies of the record. The period within which the record had to be lodged depended on whether the order appealed against "was given on an exception" within the meaning of AD Rule of Court 5(4)(a). If it was so

given, the period was six weeks after the date of the order granting leave to appeal; if not, the period was three months. Security should therefore, at best for the plaintiff, have been given by 12 February 1986. However, the plaintiff's attorney, Mr. H F E Ruppel of the firm of Lorentz & Bone, Windhoek, was under the impression that security for a respondent's costs in an appeal had to be entered into only in the event of a court's order to that effect. This was a common misapprehension prior to the decision of this court in Klipriviersoog Properties (Edms) Bpk v. Gemeenskapsontwikkelingsraad 1987(2) SA 117 (A). See the Klipriviersoog case at p 122 G-I and Salandia (Pty) Ltd v. Vredenburg-Saldanha Municipality 1988(1) SA 523 (A) at p 531 A-E. Mr. Ruppel consequently proceeded to prepare and file the record of the proceedings without having furnished security. Eventually the matter was set down for hearing in this court as an appeal on 20 February 1987.

Judgment in the Klipriviersoog case was delivered on 10 November 1986. On 30 December 1986 the defendant's

Bloemfontein attorneys sent a letter to the plaintiff's Bloemfontein attorneys concerning security for the defendant's costs of appeal. This letter, after referring to the judgment in the Klipriviersoog case, recorded that the plaintiff had made no provision for security for costs and stated that the defendant's Windhoek attorneys had given instructions that their client would under no circumstances condone or waive any of his rights to security. Mr. Ruppel received a copy of this letter, under cover of a letter from his Bloemfontein correspondents, on 8 January 1987.

From that date he was aware that security should have been provided, and I assume that he knew, as a glance at the Rules of Court would have informed him, that this should have been done, at best for him, by 12 February 1986, some eleven months earlier. He was also aware, as appears from a letter written by him to the defendant's attorneys on 15 January 1987, that an application for condonation of the late entering into security was necessary. It is in the light of this knowledge

on his part that his further conduct in this matter is to be judged.

In his affidavit in support of the plaintiff's application for condonation Mr. Ruppel states that, on receipt of the copy of the letter of 30 December 1986, he immediately informed the plaintiff about this development, and attempted to discuss the matter with the defendant's attorney. He managed to speak to the latter on 13 January 1987. The defendant's attorney reiterated that he was not prepared to waive security on behalf of his client. Then Mr. Ruppel took steps to reach agreement on the amount of the security to be furnished for the defendant's costs of appeal. As agreement could not be reached between him and the defendant's attorney, the matter was referred to the Registrar of the South West Africa Supreme Court. In the second half of January 1987 the registrar fixed the amount to be secured at R10 000.

The plaintiff was informed by telegram on 8 January 1987 that security was required to be furnished, and on 23

January 1987 he was advised that the registrar had fixed the amount thereof at R10 000. On 26 January 1987 the plaintiff sent a telegram to his attorneys asking that he be allowed until 30 January 1987 to make the payments required by them. However, on 29 January 1987 the plaintiff's attorneys informed him by telegram that they were withdrawing as his attorneys of record. This telegram was followed by a letter, dated the same day, in which the plaintiff's attorneys stated the following, inter alia:

> "The decision to finally withdraw as your attorneys of record was reached very reluctantly and only after very careful consideration of all the relevant factors pertaining to that decision.
>
> We were running out of time regarding the preparation for the appeal. This applies also to the application for condonation for the late filing of security for respondent's costs of appeal.
>
> Closely related to this was the fact that you failed to provide us with sufficient cover for our costs, which would naturally include substantial disbursements to Counsel and our Bloemfontein correspondents. We were also not provided with cover for security, which was fixed, as you know, in an amount of R10 000,00, and which you were required to furnish in terms of the

> Appellate Division Rules. Despite numerous reminders, requests and communications to you, we received no satisfactory response from you. An aggravating factor was the fact that you made previous promises for payment of the required deposit, which were then not honoured."

The plaintiff replied to this letter on 5 February 1987, explaining why funds had not been forthcoming. This letter ended as follows (the Khuta, to which reference is made in the letter, is the tribal authority of the Basubia tribe, of which the plaintiff is the chief):

> "As for now this Khuta has no alternative Attorneys. We are still looking to you for understanding and mercy, normalise the relationship. To this effect this Khuta is sending a high powered delegation to take up serious and binding discussions with you. All required costs shall be discussed. We shall look for alternative Attorneys after we have exhausted these new efforts.
>
> This obviously shall lead to the adjournment of the case as shall be arranged with the new Attorneys. We cannot proceed with the case unrepresented.
>
> Your good understanding in this matter shall be highly appreciated."

Despite the reference in the letter to the

of the case, no steps were taken to have the appeal postponed or removed from the roll, and it was duly called on 20 February 1987. There was, of course, no appearance on behalf of the plaintiff (appellant). The court ordered that the matter be struck from the roll inasmuch as no security had been entered into in terms of the Rules of Court.

It does not appear from the papers that the meeting between the Khuta and the plaintiff's attorney, contemplated by the plaintiff's letter of 12 February 1987, took place. After this letter nothing seems to have been done until the Chief Justice, faced with a matter which was apparently dormant, caused the following letter to be sent to the plaintiff's Bloemfontein attorneys on 25 March 1987:

"APPÉL : JOSHUA M. MORALISWANI vs ROBERT MUHINDA MAMILI

1. Die bogemelde appèl is op 20 Februarie 1987 van die rol geskrap as gevolg van die feit dat die Appellant nie sekuriteit gestel het ingevolge die hofreëls nie.

2. Sy Edele die Hoofregter het my dit opgedra dat die Appellant in kennis gestel moet word

dat hy binne drie maande, eindigende 26 Junie 1987, moet aandui indien hy gaan voldoen aan die reëls van die hof naamlik om sekuriteit te verskaf en die nodige kondonasie-aansoek gaan liasseer. By gebreke daaraan sal die afskrifte van die oorkondes vernietig word en dit sal beskou word dat die Appellant nie voortgaan met sy appèl nie.

3. Geliewe hierdie kantoor gepas in te lig van die Appellant se sienswyse."

I should perhaps at this stage state the obvious, namely that this letter was not an invitation to the plaintiff to proceed with the appeal, nor an intimation that if security were lodged by 26 June 1987, condonation would be granted. The only purpose of the letter, clearly, was to enable this court to obtain some certainty as to the plaintiff's intentions for the sake of its own administrative arrangements.

Regarding this letter and his reaction thereto, the plaintiff states the following:

"9.

During April 1987 your petitioner was informed of Your Lordship's direction that your petitioner should indicate by not later than 26 June 1987 whether he intended to comply with the Honourable Court's Rules

in regard to the furnishing of security. Your petitioner, who can only reach decisions in matters of the magnitude of the instant one, in a meeting with the full Khuta, the tribe's principal authority, consisting of senior tribesmen from all parts of the Caprivi inhabited by members of the Masubia Tribe. Messengers had to be sent to carry the instructions for an extraordinary meeting of the Khuta to the far reaches of the Caprivi. When the Khuta sat, it was decided that your petitioner's attorneys should be asked to formally reinstate themselves as attorneys of record for your petitioner in this appeal and that everything possible should be done to ensure that the appeal in this Honourable Court could proceed.

10.

Sufficient funds had already been raised shortly before the date on which the appeal was to be heard initially: however, the funds only reached your petitioner's attorneys in Windhoek after the said attorneys had already ceased to act on behalf of your petitioner, and in any event too late for the preparation of a petition to Your Lordship for condonation of your petitioner's failure to furnish the required security timeously."

It is to be noted that the convening of the Khuta was necessary, according to the plaintiff, for a decision concerning the further prosecution of the appeal, and the decision which was in fact taken was that everything possible should be done to ensure that the appeal could proceed. When the plaintiff then

continues by saying that "sufficient funds" had already been raised shortly before the date on which the appeal was to be heard initially, he clearly means sufficient funds to give effect to the Khuta's decision. In the context this would include funds to provide security as well as funds to cover the attorneys' fees and expenses. It would appear, therefore, that prior to 20 February 1987 the plaintiff was financially able to engage or re-engage attorneys in order to proceed with the appeal, but did nothing about it until shaken into action by the events following upon the registrar's letter of 10 April 1987. And the fact that the Khuta had to be convened, suggests that the reason for the inaction was that there was no existing decision to proceed with the appeal.

After the meeting of the Khuta, referred to by the plaintiff in the above quoted passage, a delegation of the Khuta consulted Mr. Ruppel in Windhoek, and he explained the position to them. On 15 June 1987 Mr. Ruppel received a telegram instructing him to apply for condonation. He secured a new

power of attorney authorizing him to act on behalf of the plaintiff. On 24 June 1987 he reached agreement with the defendant's attorneys on the manner in which security was to be provided. On 26 June 1987 he caused to be lodged with the registrar of this court a notice of reinstatement, a power of attorney, and a letter relating to security.

As appears from the above, security was in the result entered into more than a year and four months too late. The plaintiff and his attorneys knew that this delay required condonation and that a petition in this regard should be filed. Such a petition was filed with the registrar of this court only on 10 February 1988, some seven and a half months after security was in fact entered into, and almost exactly two years (assuming everything in the plaintiff's favour) after it should have been entered into. What explanation is offered for the further delay between June and February? Mr. Ruppel says the following in this regard:

"3.6 It was my understanding that the petition

would not be considered separately by this Honourable Court, but that it would be heard and determined simultaneously with the appeal itself. I accordingly did not understand there to be any urgency in relation to the submission of the petition for condonation of the petitioner's non-compliance with the Rules relating to the furnishing of security for respondent's costs of appeal.

3.7 Towards the end of August 1987 I was requested by my correspondents in Bloemfontein to urgently forward the petition for condonation. Due to pressing work, which I was unable to postpone, I simply could not manage to draft the petition for consideration by your petitioner until late in November this year.

3.8 I regret any inconvenience which the resulting delay may have occasioned, and humbly crave that my conduct in this regard be condoned by this Honourable Court."

Several points call for comment. Mr. Ruppel expresses an understanding that the petition would be heard and determined "simultaneously with the appeal itself". This is a misconception. The true position is that a date for the hearing of an appeal cannot be fixed until rule 6 has been complied with or condonation for non-compliance granted (Rules 7.1 and 13).

Indeed there is strong authority for the proposition that failure to comply with rule 6 causes an appeal to lapse, and that condonation by this court is needed to revive it (see Vivier v. Winter; Bowker v. Winter 1942 AD 25; Bezuidenhout v. Dippenaar 1943 AD 190 at p. 192 and United Plant Hire (Pty) Ltd v. Hills and Others 1976(2) SA 697 (D & C) at pp. 699 C to 700 A. See also Waikiwi Shipping Co. Ltd. v. Thomas Barlow & Sons (Natal) Ltd 1981(1) SA 1040 (A) at 1049 B-C and S v. Adonis 1982(4) SA 901 (A) at p. 907 F-G dealing with the related subject of an appellant's failure to file the record in time).

In the absence of a petition for condonation there was accordingly nothing for this court to consider, and, in particular, no appeal could be heard until condonation had been granted. This, incidentally, was the reason why the matter was struck from the roll on 20 February 1987. Had there been an appeal before the court on 20 February 1987, the usual course would have been to dismiss it for non-prosecution in terms of Rule 7(2) and this course might well have been followed.

Mr. Ruppel's understanding was therefore erroneous. There was no way in which the petition for condonation could be heard simultaneously with the appeal itself. At most the parties' arguments on the petition (and, in particular, their contentions on the petitioner's prospects of success) could have been treated as constituting also their arguments on appeal if condonation were to be granted. That, however, is another matter, and the possibility that this course might be followed did not afford any reason for supposing that the submission of a petition for condonation was not a matter of urgency.

The reason why Mr. Ruppel considered that submission of a petition was not urgent consequently cannot bear scrutiny. And, in any event, he was requested towards the end of August 1987 in a letter from his correspondents in Bloemfontein "to urgently forward the petition for condonation". This letter is one of the few relevant documents of which a copy is not attached to the papers. The inference may fairly be drawn that it expressed a high degree of urgency. Nevertheless "pressing

work" prevented Mr. Ruppel from drafting the petition until late November 1987. The petition itself is a relatively simple document of eleven pages. It is verified on affidavit by the plaintiff. In addition there is attached to it an affidavit by Mr. Ruppel, from which I have quoted certain extracts. These were the only documents that required drafting. They could not have taken long to prepare. In my view it is not a sufficient explanation to say that "pressing work", of which the nature and extent are unspecified, made it impossible to perform this undemanding task.

Moreover it must be remembered that Mr. Ruppel did not practise on his own. The firm of Lorentz & Bone had at that time, according to copies of letter heads attached to the papers, six partners, of whom Mr. Ruppel was one. It is probable that the firm engaged articled clerks and assistants. Mr. Ruppel does not mention in his affidavit that he made any attempt to enlist the aid of any other member or employee of his firm to assist him with the urgent task of drafting the petition, or to

lighten his work load in some other way so as to enable him to attend to it himself.

But the matter does not end there. In late November, Mr. Ruppel states, he was able to attend to the drafting of the petition. The petition and verifying affidavit were signed only on 22 December 1987. Mr. Ruppel's own affidavit was signed and sworn to more than a month later, on 25 January 1988. No explanation at all is offered for these further delays. The petition was, as I have stated, eventually filed on 10 February 1988.

On a conspectus of the history of this matter it appears that there were gross delays in the provision of security pursuant to Rule 6 and in the filing of a petition for condonation. Up to January 1987 this delay is explained by the uncertainty which existed prior to the decision of this court in the Klipriviersoog case (supra). The plaintiff's default during this period may be regarded as venial (see the Klipriviersoog case, loc.cit. and Salandia (Pty) Ltd v. Vredenburg-Saldanha

Municipality, loc. cit. However, the plaintiff and his attorneys became aware early in January 1987 that the provision of security was necessary and overdue. It has often been held that, whenever a prospective appellant realizes he has not complied with a rule of court, he should, apart from remedying his default immediately, also apply for condonation without delay. See Rennie v. Kamby Farms (Pty) Ltd 1989(2) SA 124 (A) at p. 129 G and earlier cases there quoted. This applies a fortiori in the present case, where the non-compliance was of such long standing. The plaintiff and his attorneys did not heed this precept. In particular there are two periods of delay for which no acceptable explanation has been given. The first was caused by inaction on the part of the plaintiff; the second by his attorney.

As far as the plaintiff was concerned: he knew on 8 January 1987 that security had to be provided. He also knew that his attorneys required funds in order to provide security and, generally, to proceed with the appeal. On 29 January 1987

his attorneys withdrew because funds were not forthcoming. Before 20 February 1987 the plaintiff had raised sufficient money to proceed with the appeal, but he took no steps to engage new attorneys or to re-engage his former attorneys until he was in effect presented with an ultimatum by the Chief Justice in early April 1987. Even then he took until 15 June 1987 before giving Mr. Ruppel instructions to proceed with the application for condonation. As noted above, it seems probable that for some months during the first half of 1987 the plaintiff had no firm intention of continuing with the appeal and that this accounts for the delay during this period.

As far as Mr. Ruppel is concerned: he was authorized to proceed with an application for condonation on 15 June 1987. Nevertheless the petition was not filed before 10 February 1988. The explanations given by him for this delay, to the extent to which he gave any, cannot stand analysis, as I have endeavoured to show.

The effect of the delays in the present matter has been

particularly serious. The litigation between the parties commenced as long ago as 18 April 1983, and the court a quo gave judgment in the present matter on 12 June 1985. Various issues between the parties must still be determined by trial, but this cannot be done until finality concerning the plaintiff's proposed appeal has been reached. In these circumstances the extent of the delays, and the failure of the plaintiff or his attorney to give a satisfactory explanation for them, are such that condonation ought, in my view, to be refused. The fact that much of the blame may be attributed to the plaintiff's attorneys does not, in my view, detract from this conclusion. As was stated in Saloojee and Another NNO v. Minister of Community Development 1965(2) SA 135 (A) at p. 141 C

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of 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."

See also Immelman v. Loubser en 'n Ander 1974(3) SA 816 (A) at p. 824 A-B and P E Bosman Transport Works Committee and Others v.

Piet Bosman Transport (Pty) Ltd 1980(4) SA 794 (A) at p. 799 F in fin.

In what I have said above, I did not deal with the plaintiff's prospects of success on appeal. There are two reasons for this. Firstly, there is the form of the petition. As was stated in Rennie v. Kamby Farms (Pty) Ltd (supra) at p. 131 E, it is advisable, where application for condonation is made, that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. This was not done in the present case: indeed, the petition does not contain even a bare averment that the plaintiff enjoys any prospect of success onappeal. But secondly, and in any event, the circumstances of the present case are such that the court should, in my view, refuse the application irrespective of the prospects of success. (Rennie v. Kamby Farms (Pty) Ltd, supra, at p. 131 I-J and earlier authorities there quoted).

In the result, and for the reasons set out above, the

court made the following order on 3 May 1989:

The application for condonation is refused with costs, such costs to include the respondent's costs as on appeal.

E M GROSSKOPF, JA

HOEXTER, JA
HEFER, JA
MILNE, JA
EKSTEEN, JA

Concur