

MARGARET MALAMA-KEAN v. THE STATE

CASE NO. CA 21/2001

2001/06/15

Maritz, J. *et* Hoff, J.

PRACTICE

Late filing of heads of argument - effect on the administration of justice considered - Rules to be applied more stringently in future - applications for condonation - only in exceptional cases will the error and oversight of legal practitioners and their employees be regarded as "good cause" for purposes of such applications - Practice directive in the form of *caveat* to practitioners.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARGARET MALAMA KEAN

versus

THE STATE

CORAM: MARITZ, J *et* HOFF, J.

Heard on: 2001.06.15

Delivered on: 2001.06.15 (*extempore*)

JUDGMENT

MARITZ, J.: This Court is seized with an appeal against an order of the Magistrate, Oshakati in which she granted a postponement of a criminal matter pending before her. The appellant is indicted before that court, albeit still provisionally, on several counts of fraud and theft amounting to about N\$150 000.

At the outset of these proceedings counsel for the appellant moved an application for condonation for the late filing of the appellant's heads of argument. In support of that application he filed an affidavit in which he frankly recorded that the failure to comply with the time periods prescribed by the Rules of Court was occasioned by his fault: He did not notice that the date on which the appeal had been set down was a Friday and not a Monday, as he was accustomed to. He advanced that almost all the appeals he had been briefed in previously were set down on Mondays. Expecting that it would also be the case in this appeal, he thought that he would have time until Monday, 11 June 2001 to file heads of argument on behalf of the appellant.

The appeal was not set down on a Monday (as he thought) but on Friday, 15 June 2001. The Registrar's notice advising the parties of the set down, not only expressly recorded the date but also that the date falls on a Friday. Moreover, the notice drew counsels' attention to the provisions of the relevant rule dealing with the periods within which heads of argument had to be filed. In addition, appeals are often set down on days other than Mondays.

Bearing in mind the serious consequences that may result for a litigant whose counsel is in default due to tardiness or lack of diligence, this Court, almost invariably, granted condonation for the late filing of heads in the past - sometimes accompanied by a postponement and, in civil

cases, an appropriate order of costs. However, the frequency with which this Court has had to deal with applications of this nature recently, is so alarming that it suggests either willful disregard for the Rules or that certain practitioners entertain the notion that condonation "is there simply for the asking". This case is one in point. Well knowing that an application to condone non-compliance with the rules must be brought as soon as the practitioner realises his or her failure, counsel for the appellant thought he would rather wait for the respondent's heads of argument to ascertain from that what its attitude was going to be about the late filing of heads before launching the application. To compound matters, he apparently did not bother to contact his instructing counsel to enquire whether the respondent's heads had come to hand (as they should) on Monday. Notwithstanding those heads having been filed timeously, he received them from his instructing counsel only on Wednesday. Only then did he prepare the application for condonation which was filed so late on Thursday with the Registrar of this Court that, given the other administrative work in the Registrar's office, it could not be brought to my attention prior to the calling of the roll - it was handed up from the bar.

The failure of practitioners, especially those appearing for applicants, appellants and excipients, to comply with the time periods prescribed by the Rules of Court for the filing of heads of argument is hampering the administration of justice. In most cases it leaves the opposing party with

no or inadequate time to reflect on the soundness or import of the submissions advanced, to research them and the authorities quoted in support thereof and to formulate a well-researched and well-considered response thereto. That, in turn, detract from the quality of the submissions made to the Court and the assistance counsel ought to afford the Court in the quest for fairness and justice. It often causes prejudice to the other party that can only be addressed by a postponement. In criminal matters the Court does not even have the mechanism - as it does in civil cases - of an appropriate or punitive cost order to adequately address the financial prejudice occasioned by the postponement to such party. Postponements cause a clogging of the Court's roll to the prejudice of other litigants; they waist valuable Judges' time; they unduly burden the Court's already stretched administrative resources and delay finality. Furthermore, failure to comply with the rule always inconveniences the other litigants, the Judge and the Court's officers. It detracts from the standard of practice required by the Rules and cultivated by the Court amongst its practitioners.

Counsel for the Respondent, Ms Imalwa, has properly drawn our attention to the remarks made by Mr Justice Coleman in *S v Basi*, 1976(4) SA 799 (T) on 799 to 800 where, faced with identical problems, he said:


"The Courts have in the past tended to be indulgent in granting condonation, mainly out of concern for the appellants who usually are not morally or otherwise to blame for the defaults of their attorneys. But the effect of the leniency extended by the Courts appears to be a growing disregard for the terms of the Rules. ... In the circumstances a more stringent application of the Rule is called for. ... It is only in exceptional circumstances that the late filing of heads of argument will be condoned, and the error or oversight of a legal practitioner or his employee will rarely, if ever, be treated as a ground for condonation."

We associate ourselves with these remarks.

Having considered the application, the merits of the appeal and, in particular the substantial prejudice that will result to the appellant if we were to strike it from the roll, we have decided to grant condonation - but do so subject to the issuing of a directive in the form of a *caveat* to all practitioners that, in future, this Court will strictly enforce the Rules of Court relating to the filing of heads of argument and that, only in exceptional circumstances, will the error or oversight of a legal practitioner or his or her employee be regarded as "good cause" for purposes of an application for condonation.


MARITZ, J.

I agree.


Hoff, J

For the Appellant:

ADV R. HEARTHCOTE

Instructed by:

HENNIE BARNARD & PARTNERS

For the Respondent:

ADV O. M. IMALWA

Instructed by:

THE PROSECUTOR-GENERAL