CASE NO. A 190/2007

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHN BENADE	**1ST**
APPLICANT	
LILLY BENADE	**2ND**
APPLICANT	
SOUTH WEST AFRICA BUILDING SOCIETY	
(SWABOU/SWABOU INVESTMENTS (PTY) LTD	**3RD**
APPLICANT	
FIRST NATIONAL BANK OF NAMIBIA LTD	**4TH**
APPLICANT	

and

ERICA BEUKES	**1ST**
RESPONDENT	
HEWAT BEUKES	**2ND**
RESPONDENT	
THE REGISTRAR OF DEEDS	**3RD**
RESPONDENT	
THE DEPUTY-SHERIFF OF THE HIGH	
COURT OF NAMIBIA	**4TH**
RESPONDENT	

CORAM: HOFF, J

Heard on: 23 February 2009

Delivered on: 23 May 2011

JUDGMENT

HOFF, J: [1]This is an application brought on notice of motion (as amended) in which the applicants seek the following relief:

> "1.For an order declaring that the appeal which was noted against the judgment of Mr Justice Muller by the first and second respondents on 31 March 2006 had lapsed;
>
> 2.first and second applicants intend making an application for an order in terms whereof:
>
> 2.1 first and second respondents are ordered to vacate the property situated at 4479 Dodge Avenue, Khomasdal, Windhoek within seven days of the handing down of this order, failing which;
>
> 2.2 fourth respondent shall be authorised to remove first and second respondents from the property, if need be, with the assistance of the Namibian Police;
>
> 3.In the alternative, that the orders in terms of prayers 2.1 and 2.2 shall serve as an interim interdict with immediate effect, pending the outcome of the appeal lodged by first and second respondents on 31 March 2006.
>
> 4.first and second respondents pay the applicants' costs of this application (if opposed);
>
> 5.such further and/or alternative relief as the above Honourable Court may deem meet, is granted."

[2] The first and second respondents opposed the application.

Background to application

[3] On 26 November 2001 the third applicant obtained a default judgment against first and second respondents and Erf 4479 Dodge Avenue was declared executeable.

On 24 Mardh 2005 applicants bought the property situated at Erf 4479 Dodge Avenue at a sale in execution which was held by fourth respondent in execution of the default judgment.

On 8 April 2005 first and second respondents launched an application for an order *inter alia* to set aside the sale in execution. This application was struck from the roll.

On 30 June 2005 Erf 4479 Dodge Avenue Khomasdal was transferred into the names of first and second applicants.

On 4 July 2005 first and second applicants issued summons in the Magistrate's Court for an eviction order against first and second respondents who had refused to vacate the property after the sale in execution. First and second respondents entered an appearance to defend that action. First and second applicants thereafter applied for summary judgment. The first and second respondents in response filed a plea, a special plea and a counterclaim (all unsigned). In the special plea first and second respondents pleaded that the Magistrate's Court did not have jurisdiction to grant an eviction order in as much as the property in question was "purportedly" sold in terms of the Rules of the High Court.

This action was stayed pending the outcome of an application launched by the first and second respondents on 25 July 2005 in the High Court in which they *inter alia* again prayed for the setting aside of the sale in execution. The application for summary judgment had in the interim been withdrawn.

This second application for setting aside the sale in execution was heard by Muller J on 22 January 2006 and judgment was delivered on 7 March 2006 dismissing the application with costs.

On 31 March 2006 first and second respondents filed a notice of appeal in the Supreme Court of Namibia. The notice of appeal was not, as required in terms of Rule 5(1) of the Supreme Court Rules delivered to the Registrar of the High Court.

[4] The first and second applicants as well as third and fourth applicants noted their opposition to the appeal on 11 April 2006 and 28 April 2006 respectively.
On 5 June 2006 applicants through their attorneys received a document from first and second respondents which reads as follows:

> "Kindly take notice appellants are as yet unable to secure the records of proceedings in the High Court in the above matter as they are still awaiting approval of legal aid. Kindly indicate your agreement within 5 days hereof to deliver it as soon as legal aid is approved or as soon as possible after any decision in that regard had been made.
> Should you decline to agree to an extension of time with regard to the records, applicants will apply for condonation."

[5] On 24 June 2006 third and fourth applicants notified first and second respondents that they object to the extension of time as requested by first and second respondents. First and second respondents were also informed that any condonation application as contemplated by first and second respondents, would be opposed.

[6] No further steps were taken by the first and second respondents after the delivery of the document dated 5 June 2006.
First and second respondents have not at the time of the hearing of this application on 23 February 2009 delivered a record of the proceedings to any of the applicants, have not launched an application for extension of time for the filing of the record and have not applied for condonation for the late filing of the record of the proceedings as indicated by them in the letter dated 30 May 2006.

At the time of the launch of this application in August 2007 approximately thirteen months have expired since first and second respondents had notified the applicants of their intention to apply for condonation.

First respondent's defence

[7] The first respondent in her answering affidavit contends *in limine* that this Court has no jurisdiction to hear this application since the Supreme Court is the only Court which may hear and determine whether an appeal to the Supreme Court has lapsed.

The second respondent did not depose to any affidavit in these proceedings (i.e. in this application).

[8] This Court was referred to no authority by the first respondent for the contention that this Court has no jurisdiction to hear and determine this application.

[9] The second respondent (who deposed to no affidavit) argued that the Constitution of Namibia is authority for the contention that the High Court of Namibia cannot make pronouncements on a pending appeal in the Supreme Court and referred this Court to Articles 78(4), 79(2) and 80 of the Namibian Constitution. He submitted that since Article 78(4) provides that the Supreme Court shall have inherent jurisdiction, including the power to regulate its own procedures and court rules, the High Court has no authority to pronounce itself on the Rules of the Supreme Court.

Sight is however lost of the provisions of Article 80 of the Namibian Constitution which provides that the High Court of Namibia shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the *interpretation*, implementation and upholding of the Constitution.

It should be clear from the provisions of Article 80 that the High Court has jurisdiction to interpret the provisions of the Constitution. The Constitution is the law against which all enactments of Parliament are tested to see whether or not they pass constitutional muster. If this is correct it logically follows that the High Court may interpret and pronounce itself upon any Act of Parliament including the Rules of the Supreme Court. I am not aware of any Act of Parliament which limits the jurisdiction of the High Court set out in Article 80 as contended for by the second respondent.

[10] In *Schmidt v Theron and Another 1991 (3) SA 126 (C)* the respondents failed to comply with Rules 5 and 6 of the Appellate Division Rules (South-Africa)in that a notice of appeal was not filed timeously, the required number of copies of the record had not been filed and the required security for costs was not furnished, and no application had been made by the respondents for condonation of such failure.
The Cape Provincial Division held that it was quite clear from a number of authorities that failure to comply with the Rules 5 and 6 of the Appellate Division Rules caused the appeal to lapse. This is persuasive authority (despite the fact that this judgment was delivered before the South African Interim Constitution was promulgated) that a High Court has the necessary jurisdiction to hear and to adjudicate upon Court rules made by an Appeal Court.
The point raised *in limine* by first respondent in her answering affidavit that this Court has no jurisdiction to pronounce itself on Rules of the Supreme Court is dismissed.

[11] The second respondent in his address to the Court raised other points *in limine* in addition to the point *in limine* in respect of the lack of jurisdiction of this Court.

[12] The second objection was that since the court file got lost, the applicants could not have "reconstructed" the court record without the participation of the respondents. It was correctly pointed out by Ms Viviers who appeared on behalf of the applicants that there was no reconstruction of the court record since there was no court record. Notices, affidavits, court orders and other documents were merely duplicated and a duplicate court file opened. In any event the original court file was traced in an office in the High Court building on 18 March 2009.

The third point *in limine* was that this Court could not hear this application since the applicants had instituted an action in the Magistrate's Court for the eviction of the respondents and that case had been postponed indefinitely. It however appears from the documents in the court file that a notice of withdrawal was served on both the respondents on 24.04.2007. This point *in limine* stands to be dismissed for this reason.

[13] The fourth point *in limine* was that this application had been set down for argument on 2.6.2008 on which date the matter had been removed from the roll. Second respondent stated that on that day they by chance discovered in the office of the Registrar that the matter had been set down for argument. The applicants were absent. He contended that where a matter is withdrawn, in terms of the Rules of this Court, the opposing party must consent to such withdrawal or with leave of court the proceedings may be withdrawn and since the respondents did not consent to such withdrawal the application could not have been withdrawn. Second applicant further submitted the practice in this Court is where a matter has been set down and the applicant fails to appear on the date of set down, then the application is dismissed. This is a misconception. Second respondent appears to have no knowledge at all about the difference between the withdrawal of proceedings and the removal of such proceedings from the roll. It appears form a letter (dated 22 May 2008) addressed to the Registrar of this Court from first and second applicants'

legal practitioners that since first and second applicants were clients of Legal Shield and had depleted their cover amount, that the application should be removed from the roll. The application was never withdrawn. I am unaware of any practice of this Court as contended for by second respondent. It is the practice that matters are frequently removed from the roll and subsequently re-enrolled. This is common practice. In any event no court will dismiss and application which had been struck from the roll. There is simply no merit in this point *in limine* and as such it is dismissed.

[14] Rule 5 of the Rules of the Supreme Court which *inter alia* deals with the procedure on appeal and in particular Rules 5(5) and 5(6) reads as follows:

> "5(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice –
> (a) ....
> (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 such leave.
> (c) within such further period as may be agreed upon to in writing by the respondent,
> lodge with registrar four copies of the record of the proceedings in the court appealed from , and deliver such number of copies to the respondent as may be considered necessary:
> Provided that –
> The proviso is not relevant.

Rule 5(6) provides as follows:

> "5(6), (a) ....
> (b) If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her attorney for consent to an extension thereof and given notice to the registrar that the or she has so applied he or she shall be deemed to have withdrawn his or her appeal."

[15] First respondent in her affidavit stated that she has taken advice and verily believed that the current practice is to set down "an application based on procedural shortcomings for consideration by the Supreme Court on the same date *and* time just prior to the hearing of the appeal". First respondent however did not reveal the source of her advice, and no one deposed to an affidavit in support of this contention which is in any event hearsay and which stands to be ignored.

[16] In any event it is a misconception that the condonation application must be considered at the same of the hearing of the appeal or that it is to be heard and determined simultaneously with the appeal itself.

[17] In *Moraliswani v Mamili 1989 (4) SA 1 (A)* it was contended on behalf of a petitioner's application for condonation of the late furnishing of security for the respondent's costs of appeal, that the understanding of counsel was that the petition would be heard and determined simultaneously with the appeal itself. The Court of Appeal as per Grosskopf JA expressed itself as follows at p. 8 A – D:

> "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 the 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 192; and United Plant-Hire (Pty) Ltd v Hills and Others 1976 (2) SA 697 (D) at 699 C – 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 Adams 1982 (4) SA 901 (A) at 901 F – G* dealing with the related subject of an applicant'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."

[18] In *Channel Life Namibia (Pty) Ltd v Otto 2008 (2) NR* 432 Strydom AJA (as he then was) dealt extensively with the provisions of the Namibian Supreme Court Rules and the history of the Rules which had been modelled on the Rules of the Appellate Division of the Supreme Court of South Africa. Strydom AJA referring to a number of South African judgments including *Moraliswani (supra)* stated at p. 443 (par. 37) that he respectfully agreed with the interpretation of the rule by the Appellate Division of South Africa seeing that our rule 5 (6)(a) and (b) is almost identical to that of the Appellate Division of South Africa.

Strydom AJA at par. 39 concluded as follows:

> "I have therefore come to the conclusion that the point taken by Mr Coleman cannot succeed. As far as our rule 5 (6)(a) and (b) is concerned I find that sub-rule (b) applies to regulate the period within which a cross-appeal is to be prosecuted and that is does not apply to the present instance where an appellant failed to deliver the record of the appeal timeously as provided for by rule 5(5). In such an instance the appeal is deemed to have lapsed and may be struck from the roll. However, an application for condonation may be brought in terms of rule 18 and, on good cause shown, the failure to comply with the rules may be condoned and the appeal re-instated."

Jurisdictional facts in respect of Rule 5 (6)(b) of the Rules of the Supreme Court

[19] It appears to me from a considerations of the language used in Rule 5 (6)(b) that the following jurisdictional facts must exist in order for the deeming provision to come into effect:

(a) an appellant has failed to lodge the record within the prescribed period. (*In casu* three months from date of judgment).

(b) has not within such period applied to the respondent or his or her attorney for consent to an extension,

and

(c) has not given notice to the Registrar that an application was made to the respondent or his or her attorney that consent for an extension of the period had been sought.

[20] It is common cause that the first and second respondents (as appellants in case no. (P) A 223/2005) did not lodge the record within the period of three months after judgment had been delivered on 7 March 2006.

[21] Regarding (b) and (c) the respondents requested an extension in respect of the period from the attorneys of the applicants by way of a letter dated 30 May 2006 and received by the attorneys on 5 June 2006.

This notice was also brought to the attention of the Registrar on 5 June 2006.

[22] Requirement (b) however must be read with Rule 5 (5)(c) which requires the written consent of the opposing litigant (i.e. the applicants in this matter). No such consent was granted by any of the applicants. First and second applicants informed first and second respondents in writing that they did not agree to the extention of time requested and simultaneously indicated that any application for condonation would be opposed.

[23] It is common cause that neither first respondent nor second respondent had at the time of the hearing of this application, filed any application for condonation for non-compliance with the provisions of the Rules of the Supreme Court as contemplated by Rule 18.

[24] Whenever a litigant realises that he or she has not complied with a Rule of Court such litigant must apply for condonation without delay. In *Moraliswani (supra)* at p. 9 D – E the following appears:

> "It has often been held that, whenever a prospective appellant realises 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 129 G* and earlier cases there quoted."

[25] The respondents were fully aware of the fact that they had to apply for condonation in respect of their failure to comply with the Rules of the Supreme Court. This is clear from the request for an extention of time received by first and second respondents on 5 June 2006. Two years and 8 months later when this application was heard no such application for condonation was made by the respondents.

The first respondent in her answering affidavit (paragraph 24) stated that "the opportunity to file for condonation is still not lost and I intend to have a condonation application filed simultaneously with the prosecution process of the appeal for once off adjudication prior to the hearing of this appeal by the Supreme Court".

This is a misconception for the reasons mentioned *(supra)*. There is otherwise no explanation for this delay.

It is common cause that the appeal record has not been lodged within the prescribed period and that no written consent had been given for the extention of such prescribed period by any of the applicants.

[26] In my view in these circumstances the deeming provision comes into operation resulting in the lapsing of the appeal noted against the judgment of Muller J.

First respondent's defence to application

[27] The first respondent averred in her answering affidavit that the essence of the delay in prosecuting the appeal against the judgment of Muller J was due to

"evolving (sic) procuring the record of proceedings for the purposes of Rule 5 (5) of the Supreme Court Rules".

First respondent blames the Directorate of Legal Aid, as well as her inability to procure the necessary financial resources, for her failure to prosecute her appeal.

She furthermore makes the bare statement that she has the *bona fide* intention to reverse the default judgment on appeal and believes that she has good prospects of success on appeal.

[28] The first respondent annexed to her opposing affidavit eight separate documents (EB1). The first document is a letter directed by second respondent to the Directorate of Legal Aid. Second respondent did not depose to a confirmatory affidavit.

The second document (dated 13 July 2006) was a letter from "Chief: Legal Aid" granting legal aid to second respondent in respect of the "unlawful sale of the house", and appointing Murorua & Associates as legal representatives.

The third document was a letter from the Director of Legal Aid addressed to the Registrar of the High Court advising that legal aid had been provided to second respondent. Fourth document is a CompuNeedsNamibia worksheet dated 30 May 2006 reflecting the ordering of one copy of the record of case no. (P) A 223/2005. This fourth document contains a facsimile report dated 3 March 2005 whereas case no 223/2005 was only launched on 28 July 2005. It appears that the wrong case number (P) A 223/2005 appear on this document whereas the appeal referred to in this worksheet refers to the matter between Hewat Beukes, John Benade and the Municipality of Windhoek, a different application.

The fifth document a CompuNeedsNamibia document dated 31 July 2007 in which it is indicated that the cost of the record of the appeal in respect of three listed cases would at least be N$40 000.00. This letter was written by CompuNeedsNamibia a year after Murorua & Associates was appointed as attorneys for second respondent.

The sixth document is a letter dated 25 May 2005 from Murorua & Associates addressed to the Director Legal Aid pertaining to a totally different case. At this stage case no. 223/2005 had not yet been launched. The seventh and eight documents are two court orders pertaining to case no. 249/2002 and case no. (P) A 238/2005 none of which has anything to do with case no. (P) A 223/2005, the subject matter of the appeal against the judgment of Muller J.

[29] It appears from the aforementioned documents that some contain inadmissible hearsay whilst others are completely irrelevant to case no. 223/2005, the subject matter of the appeal.

[30] First respondent also stated in her opposing affidavit that the Directorate of Legal Aid authorised CompuNeedsNamibia on 14 August 2007 to proceed with the compilation of the record of the proceedings. This statement in the absence of a confirmatory statement by someone employed by the Directorate of Legal Aid amounts to inadmissible hearsay evidence.

[31] There is no supporting affidavit by Mr Murorua to explain what he has done to procure the record of the proceedings from the date of his appointment on 13 July 2006 until the date upon which the first respondent's opposing affidavit was filed in these proceedings on 28 August 2007, a period of thirteen months.

[32] First respondent also relies on two letters one addressed to second respondent and the other to a Mr H Christian both marked "EB2", both of which amount to inadmissible hearsay evidence in respect of matters irrelevant to the relief sought.

[33] It is trite law that hearsay evidence contained in an affidavit and supporting documents stand to be ignored.
(See *Barotti Furniture (Pty) Ltd v Moodley 1996 NR 295 HC at 295 G – J; Passano v Leissler 2004 NR 10 HC at 17 A – D*).

Events after filing of applicant's replying affidavits in October 2007

[34] On 3 April 2008 the Assistant Registrar of the Supreme Court informed first respondent that their appeal has lapsed due to their failure to prosecute the appeal.

[35] First and second respondents in response addressed a letter to the Registrar of the Supreme Court (dated 30 April 2008) in which they protested against the letter dated 3 April 2008, and in which it was alleged that the Registrar had informed them the previous week that the record is nearing completion and that the appeal may be set down in the last term.

[36] First and second respondents filed a letter dated 1 May 2008, served on attorneys Fisher, Quarmby & Pfeifer on 8 May 2008 in which they contended that the provisions of Rule 5 (6)(b) had been complied with by them. In the letter dated 12 May 2008 the Registrar of the Supreme Court informed the first and second respondents that the letter informing them that the appeal is deemed to have lapsed was "wrongly issued" and the letter was withdrawn.

[37] For the reasons mentioned (*supra)* the Registrar was in my view correct in stating that the appeal was deemed to have been withdrawn and should not have withdrawn such notification to the respondents.

[38] Regarding the averment by the first respondent that she experienced difficulties in lodging timeously, or at all, the record of the proceedings it must be noted that application proceedings were adopted in that matter. The record of the proceedings consisted of affidavits, heads of argument, the notice of appeal, and the judgment of Muller J. The argument by the respective parties need not be typed and it is an enigma why the record of those proceedings could not have been lodged as prescribed by the Rules of the Supreme Court.

First and second applicants' relief sought in respect of an ejectment

[39] It is common cause that the first and second applicants bought Erf 4479 Dodge Avenue, Khomasdal on 24 March 2005 at a sale in execution of a default judgment.

The first applicant in his founding affidavit stated that Erf 4479 was transferred into his name and that of second applicant.

First respondent in her opposing affidavit did not deny that the property had been so registered in the names of first and second applicants save to contend that since the transferor (third applicant) had already ceased to exist on 1 April 2002 such registration is of no legal force and effect. This issue has been dealt with by Muller J in his judgment handed down on 7 March 2006.

[40] In *Chetty v Naidoo 1974 (3) SA 12 (A) at 20 A – C* the Court held as follows:

> " "The incidence of the burden of proof is a matter of substantive law (*Trega and Another v Godard and Another*, 1939 AD 16 at p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipality Council v Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v Gengemma,* 1954 (4) SA 468 (N) at pp. 470 H 0 471 E) that one of

> its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *reivindicatio*, need therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp. 382 E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (*Krugersdorp Town Council v Fortuin*, 1965 (2) SA 335 (T)."

[41] First and second respondents have the onus to establish a right to be in occupation of the property. The respondents have tendered no evidence to establish any enforceable right against first and second respondents.

In the previous proceedings before Muller J the respondents sought the setting aside of the sale in execution of the property (Erf 4479) and the transfer thereof in their names. This does not constitute a basis to continue to occupy the property pending an appeal against the refusal of the order which they sought in those proceedings.

[42] The first and second applicants are the owners of the property and will remain the owners until such time that the transfer of the property in their names has been cancelled.

(See *De Villiers v Potgieter and Others NNO 2007 (2) SA 311 SCA at 316 F – G*).

It is common cause that no such cancellation has taken place.

[43] As owners, the first and second applicant merely had to allege that they were the owners of the property and that first and second respondents were in occupation thereof, which they did allege.

(See *De Villiers (supra)* at 316 G).

[44] First and second applicants as the registered owners of the property are entitled to an eviction order against the first and second respondents who had not established a right to be on the property.

[45] In the result the following orders are made:

1. The appeal which was noted against the judgment of Muller J(case no. (P) A 223/2005) by first and second respondents is hereby declared to have lapsed.

2. First and second respondents are ordered to vacate the property situated at Erf 4479 Dodge Avenue, Khomasdal, Windhoek within seven days of the handing down of this order, failing which;

3. Fourth respondent shall be authorised to remove first and second respondents from the property.

4. First and second respondents pay the applicants' costs of this application.

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HOFF, J

ON BEHALF OF THE 1ST & 2ND APPLICANTS: ADV. VIVIER

Instructed by: METCALFE LEGAL PRACTITIONERS

ON BEHALF OF THE 3RD & 4TH APPLICANTS: ADV. VIVIER

Instructed by: FISHER, QUARMBY & PFEIFFER

ON BEHALF OF THE 1ST & 2ND RESPONDENTS: **IN PERSON**

Instructed by: