REPUBLIC OF NAMIBIA

CASE NO.: (P) I 3656/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LIMITED **APPLICANT/JUDGEMENT CREDITOR**

and

AUGUST MALETZKY **RESPONDENT/ JUDGMENT DEBTOR**

CORAM: KAUTA, AJ

HEARD ON: 19TH JUNE 2012
DELIVERED ON: 31ST JULY 2012

JUDGEMENT

KAUTA, AJ:

[1] This is an application in terms of Rule 45(12)(h), (i) and (j) of this court. The Applicant is the judgment creditor and the Respondent viz August Maletzky is the judgment debtor. In this matter I will refer to the parties simply as the Applicant and Respondent. The Applicant sought orders in the following terms from this court:

1. *Payment in the amount of N$65 728.58.*

2. *Interest at the rate of 20% per annum on the sum of N$65 728.58 calculated from the 30th of September 2010 until date of final payment.*

3. *Costs of suit.*

4. *Further and/or alternative relief.*

[2] The history of this matter is instructive and dispositive. The Applicant by way of a Combined Summons approached this court for an order confirming the cancellation of a credit agreement and return of a motor vehicle 2005 Tata Telccoline 2.0 TDI S/C 4x2. It sought this order against Jeanetta Francis Amanda Maletzky. On the 17th of November 2009, Mr. Maletzky (The Respondent) served notice of application to intervene in the above matter. This application to intervene was heard on the 5th of July 2010 by my brother Parker J who after hearing arguments from the Applicant, in the absence of the Respondent, made the following orders:

(a) *The application is dismissed.*

(b) *The Applicant must pay the Plaintiff's (Respondent's) costs on party and party scale; such costs to include costs occasioned by the employment of one instructed counsel.*

[3] On the 30th of September 2010 the Applicant's taxed costs, in the application to intervene, was allowed by the Taxing Master in the sum of N$65 728.58. Soon thereafter on the 13th of October 2010, the Applicant issued a warrant of execution and attempted to execute against property of the Respondent. The Deputy Sheriff served this process and demanded payment from the Respondent. It appears from the return of service that the Respondent informed the Deputy Sheriff that he has no money or property to satisfy this payment; as a result a *nulla bona* return was recorded. Not satisfied with this outcome the Respondent launched another application to intervene on the 7th July 2011. This latter application was brought with a Rescission of Judgment application. My brother Swanepoel J who heard both these applications refused these applications with costs of one instructing and one instructed counsel. On the 22 August 2011 the Defendant served a Notice of Appeal against the orders given by Swanepoel J. It is common cause that the Rescission application was brought almost a year after Parker J, dealt with the initial intervention application.

[4] The Respondents has to date hereof not prosecuted his appeal. A period of eleven months has now passed since. In answer to this matter the Respondent appeared in person and robustly opposes it. He asserts that this application is lis *pendens* as an appeal is still pending in the Supreme Court. Consequently, there's simply no merit to this matter according to the Respondent. The Applicants answer is that there's simply never been an appeal and even if one existed it has lapsed.

[5] Rule 5(5)(b) of the Supreme Court provides, in relevant part, that after an appeal has been noted in a civil case **" that appellant shall, subject to any special directions issued by the Chief Justice…within three months of the date of the judgment or order appealed against… lodge with the 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 necessary…" It is an undisputed fact that to date hereof the Respondent has not complied with this Rule. The consequence of failure to comply with this Rule is that the appeal will be deemed to have been withdrawn, unless the non-compliance has been condoned and the appeal is reinstated.*(Vivier v Winter, Bowkett; Bowkett v Vivier 1942 AD 25 at 26; Bezuidenhout v Dippenaar 1943 AD 190; United Plant Hire (Pty) v Hills and others 1976 (2) SA697 (D) at 699 D-H; Moraliswane v Mawili 1989 (4) SA 1 (A) at 8 B-C; Schmigt v Theron and another 1991 (3) SA 126(C0 at 130 C-F).*

[6] In *Erica Beukes and another v South West Africa Building Society (SWABOU*) a Supreme Court Judgment heard on 7th of April 2012 and delivered on 5th of November 2010 Langa AJA held that: *"An application for condonation is not a one-sided exercise designed for the convenience only of the Applicant. There are other interests involved. It has been held that matters to be taken into account in an application for condonation include 'the Respondent's interest in the finality of the judgment, the avoidance of unnecessary delay in the administration of justice and, lastly but not least, the convenience of the Court'. (Napier v Tsaperas 1995 (2) SA 665 (A) at 671 A-C; Cairns Executors v Gaam 1912 AD at 193 referred to with approval in Chairperson of the Immigration Selection Board v Frank and another 2001 NR 107 (SCA) at 169 A-C). An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the Applicant should, without delay, apply for condonation and to comply with the Rules as soon as he or she realizes that there has been a failure to comply. (See Commission for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449; Saloojee and another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 13 H-A; Estate Woolf v Johns 1968 (4) SA 492 (A) at 497 C-D; Immelman v Loubser en 'n Ander 1974 (3) SA 816 (A) at 820 D-G; Fanapi v East Cape Administration Board 1983 (2) SA 688 (E) at 689 I to 690 A)."*

[7] The appeal on which the Respondent relies has lapsed. The Respondent though in his supplementary heads argued that the glitch in finalizing the appeal is as a result of a new institution responsible for printing court records. There is no affidavit before me explaining when this glitch arose and for how long it is meant to last. Similarly there is no evidence whether the Applicant consented to the extension of time. The issue raised in this matter relates to costs granted against the Respondent on the 30th of September 2010. I agree with the submission of Mr van Vuuren, who appeared for the Applicant that in the specific circumstances of this matter there is currently no appeal pending. This finding is bolstered by the Respondent's conduct in not having opposed the taxation before the Taxing Master on the 30th of September 2010. It is either because the Respondent knew at that time that there was no appeal pending or carelessly allowed matters to proceed and now wishes belatedly to mount the horse of the appeal. Moreover, there is no semblance of proof that there is a condonation application currently pending before the Supreme Court to reinstate an appeal, *cadit quaestio*.

[8] Rule 45(12) states that:

"(h) Whenever a court gives judgment for payment of a sum of money against a party (hereinafter called 'the debtor') the court may forthwith investigate whether the debtor is able to satisfy the judgment and for that purpose may require the debtor's attendance to give evidence on oath, and to produce such documents as the court may direct, and allow the judgment creditor to adduce such evidence as the court may think fit

(i) Whenever a return has been made to a writ of execution, that the officer charged with the execution has been unable to find sufficient property subject to attachment to satisfy the amount of the writ, or whenever a judgment debt remains wholly or in part unsatisfied after the expiration of 20 days from the date of the judgment, the judgment creditor may by notice call upon the judgment debtor to appear before

the court on a day fixed by such notice, and to produce such documents as may reasonably be necessary, in order that the court may investigate his or her financial position, and any debtor who, having been served with such notice, fails without good cause to appear, may be personally attached for contempt of court, and whenever the debtor appears pursuant to such notice the court may proceed as set forth in the preceding paragraph.

(j) Whenever the court is of opinion that a debtor is able to satisfy a debt by instalments out of his or her earnings, it may make an order for payment of such debt by instalments, and whenever an order has been made for payment by instalments and the debtor makes default in such payment, any salary, earnings, or emoluments due or accruing to such debtor to the extent of arrears may, without further notice to the debtor, but subject to the rights of the garnishee, be attached under the provisions of paragraph (a).”

[9] It is common cause that the payment of N$65 728.58 is overdue to the Applicant from the 30th of September 2010 and remains unsatisfied to date hereof despite a warrant of execution having been issued. The Respondent has delayed this payment long enough. The maxim ‘Justice delayed is justice denied’ is apposite in this matter. It is apparent that the Respondent is gainfully employed at African Labour and Human Rights Centre from the documents filed of record. For reasons and conclusions above, I make the following orders:

1. The Rule 45(12)(h)(i)and(j) application is postponed for a full financial enquiry on the **27th September 2012** at **10h00**; the Respondent is warned to appear in this court on that date.

2. The Respondent is ordered to provide to the Applicant the following documents on or before the **29th August 2012:**

(a) His monthly pay slips for the past year;

(b) His bank statements for the past year;

(c) His monthly income and expenses for the past year.

3. The Respondent is ordered to pay the costs of this application, such costs to include one instructed and one instructing counsel.

KAUTA AJ

COUNSEL ON BEHALF OF THE APPLICANT: **ADVOCATE VAN VUUREN**
INSTRUCTED BY: **BEHRENS & PFEIFFER**

ON BEHALF OF RESPONDENT: **IN PERSON**