REPORTABLE

CASE NO. SA 6/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ONDJAVA CONSTRUCTION CC **FIRST APPELLANT**
V.M. KAUTWIMA **SECOND APPELLANT**
B. HAIDUWA **THIRD APPELLANT**

and
H.A.W. RETAILERS
t/a ARK TRADING **RESPONDENT**

Coram: MARITZ, JA, CHOMBA AJA *et* LANGA, AJA

Heard on: 2010/03/05
Delivered on: 2010/03/08

APPEAL JUDGMENT

MARITZ, J.A.: [1] Subject to the provisions of s 18(5) of the High

Court Act, 1990[1] and rule 4(12) of the Supreme Court Rules[2], rule 8 of the Supreme Court Rules (the "Rules") defines the circumstances under which and the time within which an appellant must find and furnish security for the respondent's costs of appeal: Sub-rule (2) provides that, if the execution of a judgment is suspended pending an appeal to this Court, the appellant shall, before lodging with the registrar copies of the record, enter into good and sufficient security for the respondent's costs of appeal unless the respondent waives the right to security or the court appealed from, on good cause is shown,

1 The subsection confers a discretion on the High Court, when granting leave to appeal to the Supreme Court in matters contemplated by section 18(2)(b) of the High Court Act, to order the appellant to find security for costs of the appeal in such amount as the its registrar may determine, and may fix the time within which the security is to be found. The obligation to find security and the time period within which it must be done as prescribed by Rule 8(2) and (3) are irreconcilable with the discretionary powers vested by s 18(5) in the High Court to decide whether or not security should be found in appeals contemplated by s 18(2)(b) and, if so, when it is to be furnished. Rule 8(2) and (3), being subordinate, may not trench upon s. 18(5) of the High Court Act and, therefore, their application is limited by and they must be read subject to the subsection. Compare *Rogers & Hart (Pty) Ltd v Parkgebou-Beleggings & Wynkelders Bpk,* 1956 (3) SA 329 (A), *Blou v Lampert and Chipkin NNO and Others,* 1973 (1) SA 1 (A) at 7G - H and *Klipriviersoog Properties (Edms) Bpk v Gemeenskapsontwikkelingsraad*, 1987 (2) SA 117 (A) at 120B-C on the similarly worded provisions of s 21(4) of the *Supreme Court Act, 1959* (RSA) and that of Rule 6(2) of the then Appellate Division Rules in that jurisdiction.

2 It dispenses with the requirement of security when leave has been obtained to prosecute an appeal *in forma pauperis.*

releases the appellant wholly or partially from that obligation. Sub rule (3) obliges an appellant to inform the registrar in writing at the time when copies of the record of appeal are lodged whether (s)he has entered into security or has been released from that obligation either by virtue of a waiver or by the court appealed from.

[2] In addition, the sub-rule also contains a deeming provision which seeks to inform litigants about the consequences of non-compliance with its provisions: should an appellant fail to so inform the registrar, it would be deemed a failure to lodge the record of appeal in compliance with the requirements of rule 5 (5). As noted in numerous judgments dealing with provisions in other jurisdictions worded similarly to rule 5(5), although they may not specifically so state, their language implies that an appeal lapses upon non-compliance with their provisions.[3] This, in essence, is also the construction given by this Court to the sub-rule.[4] The effects thereof are that the appeal is deemed to be discontinued and that it may only be revived upon the

3 C.f. for example, *Vivier v Winter; Bowkett v Winter,* 1942 AD 25 at 26; *Bezuidenhout v Dippenaar,* 1943 AD 190 at 192; *United Plant Hire (Pty) Ltd v Hills and Others,* 1976 (2) SA 697 (D) at 699H and *Moraliswani v Mamili,* 1989 (4) SA 1 (A) at 8B - D.

4 In *Channel Life Namibia (Pty) Ltd v Gudrun Otto*, unreported judgment of this Court in Case No. SA22/2007 dated 15/08/2008, par [39].

appellant applying for – and the Court granting – condonation for the non-compliance and reinstatement of the appeal[5]; that the judgment of the High Court, suspended both under the provisions of the Rules[6] and at common law[7] by the appeal may be carried into execution[8] unless otherwise ordered upon a substantive application and, if so minded, a respondent who has given notice of a cross-appeal, must notify the registrar of his or her intention to prosecute it and thereupon assume the duties of an appellant in the proceedings,[9] to mention a few.

[3] The appellants, who appealed against a judgment of the High Court dismissing their application for rescission of a default judgment in the amount of N$585 094.99, interest and costs granted in favour of the respondent, failed to comply with the requirements of rules 5(5)

5 *Ibid*. See also *Moraliswani v Mamili, supra,* at 8B-D; *Waikiwi Shipping Co Ltd v Thomas E Barlow & Sons (Natal) Ltd,* 1981 (1) SA 1040 (A) at 1049B - C and *S v Adonis,* 1982 (4) SA 901 (A) at 907F – G.

6 Rule 49(11) of the High Court Rules.

7 See, for example: *Hollis v Chase*, 8 S.C. 3 at 5; *Reid v Godart*, 1938 AD 511 at 513 and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd,* 1977 (3) SA 534 (A) at 542E, 544G - H and 545A.

8 Compare: *Sabena Belgian World Airlines v Ver Elst and Another*, 1980 (2) SA 238 (W); *Herf v Germani,* 1978 (1) SA 440 (T) at 449G-H.

9 Rule 5(6)(a)

and 8(3). Although they lodged the record of appeal with the registrar of the Court timeously, they failed to deliver copies thereof to the respondent - as they should have done in terms of rule 5(5). In addition, knowing full-well that the respondent demanded security in the amount of N$60 000.00, they failed to inform the registrar at the time they lodged the record whether they had entered into security with it. Their remissness caused the respondent to launch an application on notice of motion seeking dismissal of the appeal with costs. This application, filed some nine months ago, prompted the appellants to provide the respondent with copies of the record of appeal and to seek determination by the registrar of the security to be entered into. Notwithstanding the security having been fixed in the amount of N$50 000.00, they failed to find it. These failures notwithstanding, they boldly sought a date for the hearing of the appeal through the offices of their legal representatives. Given the application to dismiss the appeal and the fact that there was also a cross-appeal by the respondent, the matter was set down for hearing on Friday, 5 March 2010, and the litigants were informed accordingly by the registrar.

[4] To make matters worse, the record of appeal was incomplete

because it contained no reference to the order or proceedings which was the subject matter of the cross-appeal and, in addition, the appellants' counsel failed to file heads of argument as prescribed by rule 11(1). In the absence of an application for condonation and reinstatement of the appeal and the significant extent in which the appellant, in particular, had failed to comply with the rules, the Court caused the registrar to write a letter to the litigants' legal practitioners of record notifying them that, in addition to any argument which they might advance on behalf of their clients, they would also be required to address the question whether the appeal and cross-appeal should not be struck off for want of compliance with the rules. Shortly after receipt of this notice, the appellants' legal practitioners withdrew as their counsel of record and, when the matter was called before us, the second appellant appeared in person. He also claimed that he was authorised by the first and third appellants to appear on their behalf. He explained to the Court from the bar that the appellants had found some funds to pay their legal practitioners and that, relying upon the kind offices of a friend, they would be able to pay the balance shortly. He thereupon moved an application for a postponement of the appeal. The application was opposed by Mr Grobler, appearing on behalf of the respondent, who, in turn, pressed the respondent’s application for

dismissal of the appeal.

[5] The litigants on both sides, I regret to note, have not shown any regard for the consequences which attach to their disregard of the rules relating to appeals. Having failed to find security and to notify the registrar accordingly when the appellants lodged the record of appeal and having omitted to deliver copies of the record of appeal to the respondent in breach of rules 8(3) and 5(5), the appeal lapsed. Therefore, the respondent was at liberty to execute the default judgment he had obtained against them. He had no need to bring an application for an order that the appeal be dismissed with costs. As it is, in the absence of an application – and ultimately, the granting of an order - for condonation and reinstatement of the appeal, there was no longer an appeal which could be dismissed as prayed for by the respondent - just as there was no longer an appeal pending which the appellants could set down for hearing. Once the appellants realised that they were in breach of the Rules and were unable to obtain the respondent's consent to an extension of the periods within which to comply with them,[10] they should have brought an application for

10 A salutary practice commended by Holmes JA in *United Plant Hire (Pty) Ltd v Hills,* 1976 (1) SA 717 (A) at 721C-D before an application for condonation need be made. See also: *AA. Mutual Insurance Association Ltd. v. Van Jaarsveld and Another*, 1974 (4) SA 729 (AD)

condonation and reinstatement without delay[11] and requested that the application (not the appeal) be set down for hearing in due course. Upon hearing and granting the application for condonation and reinstatement of the appeal, the Court would have been at liberty to consider their argument on the prospects of success in the appeal (advanced in support of the application for condonation) as argument on the merits of the appeal and decide the appeal accordingly. This, in essence is also the approach adopted by the South African Supreme Court of Appeal on similar rules in an appeal which emanated from this jurisdiction in the matter of *Moraliswani v Mamili*:[12]

> "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

at p. 731D referred to by him. If a respondent were to withhold consent unreasonably, he or she may be at risk of an adverse cost order in the condonation application (See: *Madzunye and Another v Road Accident Fund*, 2007 (1) SA 165 (SCA) at par [15].

11 Compare e.g.: *Rennie v Kamby Farms (Pty) Ltd,* 1989 (2) SA 124 (A) at 129G; *Ferreira v Ntshingila,* 1990 (4) SA 271 (A) at 281D-E and the authorities cited therein.

12 Supra at 8B-G and subsequently reconfirmed in *Darries v Sheriff, Magistrate's Court, Wynberg and Another*, 1998 (3) SA 34 (SCA) at 44G-H.

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 192; and *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (2) SA 697 (D) at 699C - 700A. See also *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* 1981 (1) SA 1040 (A) at 1049B - C; and *S v Adonis* 1982 (4) SA 901 (A) at 907F - 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."

[6] The *ratio* in *Mamili*'s case also explains why it will not be proper to dismiss the first and third appellants' appeal as a result of their failure to appear and prosecute their appeal in person or by counsel as is required by rule 10(2) - it being clear that the second respondent, a layperson in law, has neither actual nor legal authority to appear on their behalf.[13] It also underscores why the respondent's application for

13 Compare e.g. s.21(1) of the Legal Practitioners Act, 1995

dismissal of the appeal with costs and the second appellant's application for postponement of the appeal are misconceived and fall to be dismissed: the appeal having lapsed, there is no appeal currently before the Court which can either be dismissed or postponed. I hasten to add, that even if it would have been competent for the Court to consider the application for postponement of the “appeal”, I would have been disinclined to allow it, given the history of the appellants' frequent disregard of the Rules of this Court and those of the High Court as well as the absence of an explanation on affidavit showing good cause why the appellants have failed to comply with the Rules; why they have failed to timeously bring an application for condonation and reinstatement of the appeal; why they have not taken the necessary action to ensure that they would be ready to proceed with the appeal on the date of hearing; why they have not taken steps during the preceding year to place their legal representatives in funds and why they have not offered to find and provide security to the respondent. Moreover, the assurances of the second appellant from the bar notwithstanding, it is does not appear that there is any measure of certainty that the person, on whose goodwill they rely to provide the balance of the funds required to prosecute the appeal, will be

forthcoming. The person has not been identified; there is no affidavit from him confirming his commitment and ability to assist the appellants and, if so, on which conditions it will be done. One may have sympathy for the appellants' apparent difficulties to place and keep their legal representatives in funds, but, as Holmes JA remarked:[14] "Litigation is a serious matter and, once having put a hand to the plough, the applicant should have made arrangements to see the matter through." If indigent, there were a number of options available to them. The requirement of security is dispensed with both in pauper-proceedings[15] and in instances where legal aid is rendered by or under any law,[16] unless the Court directs otherwise. In addition, if they had good cause, an application could also have been made in the High Court within 15 days after delivery of the appellants' notice of appeal to release the appellants wholly or partially from the obligation to provide security.[17] The appellants did not pursue any of these options and one must infer that they have not done so either because they did not qualify or had no need to do so. An appellant cannot simply move

14 In *United Plant Hire (Pty) Ltd v Hills, supra*, at 721E-F

15 Rule 4(8).

16 Rule 8(6).

17 Rule 8(2)(b).

an appeal forward at a speed which meets his or her convenience.[18] After all, the respondent has an interest in the finality of the judgment obtained. So does the Court in avoiding an unnecessary delay in the administration of justice.[19]

[7] On the view I take, there is also no cross-appeal before us. The failure of the appellants to inform the registrar in writing that they have entered into security in compliance with rule 8(3), as pointed out earlier in the judgment, is deemed to be a failure to file the record of appeal in compliance with the provisions of rule 5(5). Such failure is again deemed by rule 5(6)(b) to constitute a withdrawal of the appeal. Hence, the respondent, having noted a cross-appeal, was required by rule 5(6)(a) to notify the registrar in writing that it was of the intention to prosecute the cross-appeal (if so minded or advised). Thereupon the respondent would have been deemed to be the appellant for purposes of rule 5(5) and, amongst others, would have had the duty to see to it that the record of appeal would be in order for consideration of the

18 *Yunnan Engineering CC and Another v Chater and Others*, 2006 (5) SA 571 (T) at 580C.

19 See: *Napier v Tsaperas*, 1995 (2) SA 665 (A) at 670C; *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie,* 1969 (3) SA 360 (A) at 362G and *Blumenthal and Another v Thomson NO and Another,* 1994 (2) SA 118 (A) at 120F.

cross-appeal. There is no indication that the respondent has notified the registrar of its intention to pursue a cross-appeal. In the circumstances, it must be deemed that the cross-appeal was discontinued and, for that reason, lapsed. Moreover, the record is not in order: the judgment, which is the subject matter of the cross-appeal, is not even part of it.

[8] In the result, both the appeal and cross-appeal have lapsed. As a matter of formality they fall to be "posthumously" struck off the roll. Costs should follow the result. Inasmuch as the appellants may in future seek to apply for condonation and reinstatement of the appeal, the Court must mark its displeasure with the disregard which they have shown for the Rules of Court and the litany of instances cited by the respondent where they had also done so in the Court *a quo*. Therefore, I propose that the set down of any application for condonation and reinstatement must be conditional on the finding of security and payment of the respondent’s costs occasioned by striking off the appeal.

[9] In the premises, the following order is made:

1. The second appellant’s application for postponement of the appeal is dismissed with costs.

2. The respondent's application for dismissal of the appeal is dismissed with costs.

3 The appeal is struck off the roll with costs.

4. The cross-appeal is struck off the roll with costs.

5. In the event that the appellants, or the one or other of them, apply for condonation and reinstatement of the appeal, it is directed that such application may not be set down for hearing unless appellants have paid the respondent’s taxed costs occasioned by the striking off of the appeal within 3 months of demand (such costs to be taxed within 3 months of the date of this order) and the appellants (or the one or other of them seeking condonation and reinstatement) has not entered into good and sufficient security for the respondent’s costs of appeal within six months of the date of this order.

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MARITZ, J.A.

I concur.

CHOMBA, A.J.A.

I concur.

LANGA, A.J.A.

ON BEHALF OF THE APPELLANT:

Instructed by:

ON BEHALF OF THE RESPONDENT:

Instructed by: