



CASE NO: SA 44/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ATLANTIC MEAT MARKET (PTY) LTD**

**First Appellant**

**MARKETLINK (NAMIBIA) (PTY) LTD**

**Second Appellant**

and

**STANDARD BANK OF NAMIBIA LTD**

**Respondent**

**Coram:** SHIVUTE CJ, MOKGORO AJA and NKABINDE AJA

**Heard:** 10 March 2020

**Delivered:** 15 September 2020

**Summary:** During 2004 the appellants instituted an action against the respondent for an alleged breach of contract by honouring alleged forged cheques which were debited to their accounts during the period of December 2003 to April 2010. The respondent defended the action and the matter was referred to Judicial Case Management. The matter has since then been plagued by numerous interlocutory applications. The court *a quo* made a ruling on 12 March 2018 that the appellants provide to the respondent security in the amount of N\$1 million on or before 25

April 2018. The appellants failed to provide such security and the respondent sought an order dismissing the appellants' claims with costs. The court *a quo* on 18 June 2018 dismissed the appellants' action due to their failure to pay the agreed security and ordered that the costs stand over for argument at a later stage.

Aggrieved by this decision, the appellants appealed to this court against the court *a quo*'s judgment and order.

In terms of rule 8 of the Rules of the Supreme Court, the record of proceedings should be filed within three months from the date of the judgment or order and the bond of security as stated in rule 14 is to be filed when copies of the record are lodged. However, the record in this matter was filed two months late on 20 November 2018 and bond of security on 6 November 2018. On 17 January 2019, the appellants filed a condonation application seeking condonation for the late filing of the record and the bond of security as well as the reinstatement of the lapsed appeal. The appellants also filed an application for condonation for the failure to comply with other rules of court.

On the merits, the appellants submitted that the court *a quo* misdirected itself by failing to exercise its discretion judicially when dismissing their action instituted in 2004. The respondent opposed the appeal and argued that the appellants ought to have obtained leave to appeal as the order *a quo* was not final in effect. The respondent also opposed the condonation application for the late filing of the appeal record and furnishing of security. It also sought the dismissal of the appeal with costs, including the costs *de bonis propriis* against the appellants' erstwhile legal practitioner. The respondent contended that there were no prospects of success on the merits and that the appellants failed to show good cause why the delayed filing of the appeal record and furnishing of security on appeal should be condoned.

On appeal the court had to determine the following issues:

1. Whether the judgment and order *a quo* is appealable as of right or whether appellants ought to have obtained leave to appeal;
2. Whether condonation should be granted for the late filing of the record of appeal and the bond of security and whether the appeal should be reinstated; and
3. Whether condonation should be granted for the late filing of the respondent's answering affidavit in opposition to the appellants' condonation application.

*Held* that the issue of appealability of the judgment and order of the court *a quo* has no merit as the respondent misread the order and lost sight of the case in respect of which the order appealed against was made as well as the clarification made by the court during the status hearing on 16 July 2018.

*Held* that the respondent's explanation for the late filing of its opposing affidavit is satisfactory and reasonable and should therefore be condoned.

*Held* that the appellants' explanation for the lengthy delay in filing the record of appeal is unacceptable.

*Held* that the appellants' explanation for the late furnishing of security for the respondent's costs on appeal is unacceptable.

*Held* that the court *a quo* exercised its discretion judicially when dismissing the appellants' action instituted in 2004 for failure to provide security for the respondent's costs as ordered by the court.

*Held* that there are no prospects of success and appellants' applications for condonation and reinstatement of appeal are dismissed with costs.

*Held* that the punitive costs *de bonis propriis* asked against the appellants' erstwhile legal practitioner was not properly aired by the parties during oral argument. Moreover, such a punitive costs order is not lightly granted. The punitive costs order sought was thus declined.

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## APPEAL JUDGMENT

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NKABINDE AJA (SHIVUTE CJ and MOKGORO AJA concurring):

### Introduction

[1] The proceedings in this matter are a classic example of an abuse of court processes, waste of judicial resources and blatant disregard for the objectives of the rules of court. They are also a prime instance of indifference towards Judicial Case Management (JCM) and the patent non-compliance with a court order. The High Court ordered the appellants to pay security for costs in favour of the respondent. However, because of manifest dilatory steps coupled with multiple interlocutory applications, the primary disputes between the parties remained unresolved to date.

[2] Subsequent to several interlocutory applications and disagreements about the appropriate amount for security for costs the court *a quo* resolved that the appellants should 'provide' security for costs in the sum of N\$1 million on or before 25 April 2018, failing which their claim would be struck from the roll and the proceedings dismissed. This ruling was made on 12 March 2018 and the reasons therefor were handed down on 22 March 2018.

[3] The non-payment of security persisted. In June 2018 the respondent sought an order, on notice to the appellants, for the dismissal of their claim under Case No I 2460/2004 (appellants' main action) and their defences under Case No I 1758/2007 (respondent's overdraft facility action) along with the order for costs including costs of one instructing and two instructed legal practitioner. The order dismissing the appellants' claim 'due to their failure to pay the agreed security in the sum of N\$1 million' was granted on 18 June 2018. That order was amplified by the High Court's reasons given during the status hearing on 16 July 2018. This is the order that is the subject matter of this appeal. The costs were deferred and a status hearing in Case No I 2175/2004 (in respect of the respondent's security for costs application and the appellants' review and condonation applications for security for costs) was scheduled with a status hearing of the respondent's main action under Case No I 1758/2007.<sup>1</sup>

[4] The long drawn out context below, illustrative of an indifference towards the mentioned objectives<sup>2</sup> of the rules of court, JCM and the court order is gleaned from the parties' joint status report filed pursuant to the High Court order dated 28 June 2017 and other reports during the case management.

#### Litigation background

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<sup>1</sup> The order is quoted in full later in this judgment.

<sup>2</sup> These objectives of the Rules of the High Court are set out later in this judgment.

[5] I mention from the outset that the matters under Case No I 2175/2004 and I 1758/2007 are connected. They concern the handling of cheque accounts opened for and on behalf of the appellants.

[6] The matter under Case Number I 2175/2004 relates to an action instituted in October 2004 by the appellants, Atlantic Market (Pty) Ltd (Atlantic) and Marketlink Meat Namibia (Pty) Ltd (Marketlink) against the respondent, Standard Bank Namibia Limited, for an alleged breach of contract. The respondent had allegedly honoured forged cheques which were debited to the appellants' bank accounts held at the respondent. They asked the court to order the respondent to credit their accounts with the proceeds of the forged cheques including bank charges and interest. Specifically, they asked that the accounts for Atlantic and Marketlink be credited with the sum of N\$2 322 456 and N\$9 250 133,47 respectively.

[7] The respondent filed its notice of intention to defend the action on 8 November 2004 and requested for further particulars. Without furnishing the requested particulars, the appellants applied for summary judgment nine days later. The respondent served the appellants with a discovery notice. After complying with the notice, the appellants withdrew the application for summary judgment on 25 November 2004. The respondent served the appellants with a further request for further particulars that were furnished in December 2004. A further discovery notice by the respondent was served on the appellants in February 2005. The notice was complied with.

[8] I pause to mention a side legal skirmish between the parties in the litigation. It concerned the cession exercised by the respondent held on the appellants' debtors' book. Marketlink had ceded to Atlantic its right, title and interest in its claim against the respondent. The appellants successfully applied *ex parte*, under Case No (P) A 65/2005, for an urgent interdictory relief against the respondent, restraining it from exercising any right allegedly held in terms of the cession. The respondent had requested to be and was provided with security for the legal costs it would incur in the urgent interdict. The High Court granted the interdictory order and the matter was finally decided on appeal<sup>3</sup> in favour of the appellants.

[9] The appellants filed a notice to amend their particulars of claim to which the respondent objected. The notice to amend was withdrawn and fresh amendment notice was filed on 26 October 2005. The respondent objected and the second amendment notice was withdrawn on 27 October that year. Once again, on 31 March 2006, the appellants served and filed a notice to amend (to which the respondent objected but which objection was later withdrawn), basically asking for an additional payment of past loss of profits in the sum of N\$8 422 002 and future loss of profits totalling N\$16 444 862. A further amendment notice was served and filed on 2 May 2006 and a notice of set down of the application to amend was also served and filed. This was met with an objection by the respondent based on the alleged procedural irregularity.

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<sup>3</sup> Reported as *Standard Bank of Namibia Ltd v Atlantic Meat Market* 2014 (4) NR 1158 (SC).

[10] Eventually on 15 January 2007, the respondent conceded to the amendment. The appellants thus amended their particulars of claim on 18 January 2007. On 27 February 2007, the respondent pleaded to the amended particulars on 31 March 2006. This was followed by certain procedural steps including the holding of a pre-trial conference, discoveries of documents, the filing of pre-trial minutes, application for a trial date and filing of summary practice directive.

[11] On 29 July 2008, the respondent served a notice in terms of rule 47 of the repealed Rules of the High Court<sup>4</sup> for the appellants to furnish security for costs in respect of their action. This rule has now been replaced by rule 59 of the new High Court Rules.<sup>5</sup> The appellants filed a notice of opposition dated 11 August 2008.

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<sup>4</sup> Rule 47 read as follows:

'47 Security for costs

(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his or her decision shall be final.

(3) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he or she is satisfied that the amount originally furnished is no longer sufficient, and his or her decision shall be final.

(7) Notwithstanding anything contained in these rules a person to whom legal aid is rendered by or under any law is not compelled to give security for the costs of the opposing party, unless the court directs otherwise.'

<sup>5</sup> The new rules were promulgated in 2014. In relevant parts, rule 59 provides:

'Security for costs

59 (1) A party entitled to demand security for costs from another must, if he or she so desires, as soon as practicable after the commencement of proceedings, deliver a notice setting out the grounds on which the security is claimed and the amount demanded.

(2) If a party contests the amount of security only that party so objecting must, within three days after the notice contemplated in subrule (1) is received, give notice to the requesting party to meet the objecting party at the office of the registrar on a date pre-arranged with the registrar and that notice must state the date of the meeting and the date must not be more than three days after the notice of objection to the amount of security is delivered to the party requesting the security.



The rule 47 notice was withdrawn and a fresh one, in the sum of N\$1,5 million, was filed. The application was opposed by the appellants on 8 October 2008. The appellants filed opposing papers at which point the respondent withdrew the application without tendering costs. In between these clashes, the parties exchanged notices in relation to rule 35(3).

[12] In early December 2008, the appellants filed a notice for the separation of the merits from the quantum in terms of rule 33. The respondent opposed the filing of this notice on 17 December 2008. On the same date, the respondent filed yet another rule 47 application for payment of security in the sum of N\$2,6 million.<sup>6</sup> The appellants filed a notice of opposition in January 2009.

[13] Almost two years later following the amendment of the particulars of claim dated 18 January 2007, the respondent filed its amended plea on 14 January 2009. The appellants filed a notice for discovery of documents in terms of rule 35(12) and the respondent complied on 12 March 2008. The respondent filed a set down notice in respect of rule 47 application on 22 June 2009. This was followed by its withdrawal of its opposition to the appellants' application for the separation

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(3) The registrar must determine the amount of security to be given.

(4) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to the managing judge on notice for an order that such security be given and that the proceedings be stayed until the order is complied with.

(5) The managing judge may, if security is not given within the time referred to in subrule (4), dismiss the proceedings instituted or strike out any pleadings filed by the party in default or make any order that he or she considers suitable or proper.

(6) Security for costs is, unless the managing judge otherwise directs or the parties otherwise agree, given in the form, amount and manner directed by the registrar.

<sup>6</sup> Seemingly, in the affidavit deposed to by one Mr Jan Hendrik Joubert on behalf of the respondent, an amount of N\$3 193 146,74 and not N\$2,6 million was asked for.

of the merits from the quantum. The withdrawal notice was accompanied by a draft consent order for same. The order was accordingly granted.

[14] On 23 June 2009, the respondent then took steps in terms of rule 35(3) and (6) and applied for a hearing date for its rule 47 application. The appellants replied to the sub-rule 6 notice/application. The registrar issued a date on 15 September 2009 in respect of the security for costs application. The respondent filed an index on 1 October 2009 followed by the heads of argument the next day. Although the last fresh application for payment of security for costs was filed during or about 17 December 2008, the appellants only filed their opposing affidavit on 26 October 2009, almost ten months later. On the same day they applied for a postponement of the application.

[15] On 28 October 2009, the High Court granted an order in terms of which the appellants were ordered to furnish security for the respondent's costs in the form, amount and manner determined by the registrar. Subsequently, on 1 March 2010, the registrar made a determination in the amount of N\$2 920 146,70 but did not decide on the form and manner regarding the security. The registrar's decision was taken on review on 21 April 2010 by the appellants.

[16] On 12 November 2012 the reviewing court set aside the allocation and ordered the registrar to make a determination anew. The fresh determination was made on 15 January 2014. Instead of paying, the appellants notified the respondent of their intention to bring a review of the *allocatur* once the taxing

master's stated case, which had seemingly been requested, was received. No steps were taken by the appellants for almost two and half months.

[17] The apathetic attitude on the part of and failure to pay the security by the appellants (as *dominus litis*) triggered an application by the respondent on or about 1 April 2014, for the dismissal of the appellants' main action (under Case No I 2460/2004). Without any plausible explanation regarding the delayed initiation of the review of the *allocatur* of 15 January 2014 by the taxing master, the appellants opposed the dismissal application on 7 May 2014. The respondent answered only on 30 May 2014.

[18] Approximately 11 months since the determination on 15 January 2014, the appellants lodged their overdue review application together with the condonation application on or about 5 December 2014. The respondent filed a notice of intention to oppose the review application.

[19] The dismissal application was heard on 15 April 2015, but was postponed to 20 May 2015 for a ruling. Seemingly the High Court did not make a ruling but decided that the matter be pended until all other interlocutory applications were heard and adjudicated by the court. This determination was countered by the appellants' proposal for a settlement on the basis of their counter-offer failing which, the court was implored to hear the unresolved review and condonation applications of 5 December 2014 (which was lodged only after the respondent had filed an application for the dismissal of the main action).

[20] It is important to mention the status of the matter under Case No I 1758/2007 (the respondent's overdraft facility action) in respect of which the appellants had bound themselves as surety and co-principal debtors in favour of the respondent for an unlimited amount of that overdraft facility. The appellants had suggested a consolidation of their main action with the respondent's overdraft facility action. The respondent applied for summary judgment in September 2007 with regard to its overdraft facility action. The appellants opposed the summary judgment application on the basis that the respondent breached its obligations to Atlantic and Marketlink by honouring forged cheques on their accounts. This matter remained unresolved.

[21] As per the second joint status report filed of record during September 2017, a hearing date (25 September 2017) of the review and condonation applications of security for costs and of the dismissal of the appellants' main action (under Case No I 2175/2004) was sought and allocated.

[22] On the hearing date (25 September 2017) the matter was postponed to 29 September 2017 for a status hearing in chambers for parties to obtain 'dates for hearing and arguments'. On the scheduled date (in chambers), Oosthuizen J ordered:

1. The legal practitioners for defendants [appellants] to obtain instructions in respect of the proposal by plaintiff [respondent] that defendants [appellants]

supply security in the amount of N\$1 million, in order for the matter to proceed on the merits of the case.

2. The matter is postponed to Monday, 30 October 2017 at 14h00 for a status hearing.'

[23] The respondent filed its status hearing report on 27 October 2017 in which it was stated that a letter had been addressed to the appellants on 10 October 2017 requesting them to respond to its proposed security for costs as discussed in chambers on 29 September 2017; that the appellants offered security in the form of a mortgage over a property belonging to one Mr A H Badenhorst; that the respondent's legal practitioners conducted a deed search on the said property and discovered that there was an attachment over the property and that the appellants were informed on 18 October 2017 that the respondent could not accept security in the form of a bond over the property unless the attachment was uplifted. As the property offered as security for costs did not belong to any of the appellants, the appellants were invited to confirm whether or not they were able to provide security on their own. The respondent also asked to be advised as to who would be responsible for the costs for the registration of a bond over the property. It also demanded proof of the municipal value of the property.

The respondent reported further that the appellants could not provide sufficient security and that as such, it sought directions from the managing judge on the way forward.

[24] On 30 October 2017, the court *a quo* postponed the matter to 27 November 2017 'for a status hearing in respect of the payment of N\$1 million in security by the defendant/respondent'. No payment was made.

[25] The respondent filed a further status report dated 27 November 2017, reporting, *inter alia*, that the appellants had not complied with the direction to pay N\$1 million in respect of the security for costs and asking the managing judge to dismiss the appellants' main claim in terms of rule 59(5) of the Rules of the High Court. On the same date, the appellants filed a status report stating that the order of 30 October 2017 did not indicate that they should pay security in the amount of N\$1 million, but that it simply indicated that the matter had been postponed to 27 November 2017 'for a status hearing in respect of the payment of N\$1 million in security'. They reported further that they made available the contract of sale in respect of the property which was offered as security, alternatively the proceeds of the sale of the property would be made available as security. They stated that the property was in the process of being transferred and that once the transfer had been finalised, the amount of N\$1 million would be made available. The transfer was expected to be effected towards the end of January or beginning of February 2018.

[26] On 1 December 2017, the appellants filed an interlocutory application for extension of time to be 'granted leave to furnish security for costs in the agreed amount within a reasonable time after transfer of the sale of property, erf 182, Guyot Oval, Val De Vie Estate, Western Cape, South Africa materialises'. In the

supporting affidavit, deposed to by Mr Frans Hendrik Badenhorst (a businessman and director of the appellants), the deponent stated that the appellants sought an extension of time within which to furnish security for the respondent's costs (in respect of the main action).

[27] The affidavit repeated the history of the payment of security for costs. Obviously with their tongue in their cheek the appellants stated, among other things, that the respondent had sought exorbitant amounts which prevented the matter from progressing. Interestingly they, however, mentioned that they accepted the proposed security of N\$1 million and that they had presented an unencumbered property with the value of N\$1,9 million for registration of a bond to secure the N\$1 million. They said that the respondent had accepted the registration of a bond over the property but that the property had since been sold and the transfer was expected to materialise in January 2018 whereupon the agreed security to the value of N\$1 million would be 'paid' into their legal practitioner's trust account from the proceeds of sale.

[28] Again, disingenuously, the appellants stated that they were not bound to furnish security within the time stipulated in rule 59(4) nor was the court order being disregarded. They maintained that they were not unable to furnish security. According to the appellants, the progress in the matter was not hindered nor was the respondent prejudiced in any way.

[29] The respondent opposed the extension sought. It took points *in limine*, first, that the application for extension was brought way out of time, after the ten days period stipulated in rule 59(4) had lapsed. Second, that the appellants failed to comply with rule 32, dealing with interlocutory matters and applications for directions. Specifically, the respondent contended that the appellants failed to comply with rule 32(9) and (10) in terms of which they ought to have sought an amicable resolution of the dispute. Thirdly, the respondent argued that the appellants also failed to comply with rule 55 that deals with the upliftment of the bar, with extension of time, relaxation or condonation. The respondent asserted that the application for extension was made without a proper condonation application and was not competent and that the non-compliance was fatal.

[30] The respondent stated that no specific date in January 2018 when the alleged transfer of the sold property was expected to materialise was provided and that no explanation was proffered why the proceeds of the sale are the only way security could be furnished. Significantly, so the contention went, the appellants failed to explain why they could not themselves provide security thus showing that they were not solvent – the very basis upon which security was sought in the first place. The respondent also said that during the deed search they discovered that the property was under attachment; hence they could not accept it as security for costs.

[31] It appears that the respondent had asked the appellants to uplift the bar so that the property could be considered as an acceptable security. Seemingly, the



appellants kept silent. Additionally, so it was contended, they failed to indicate how the costs of the registration of the bond over the property were to be paid.

[32] Regarding the individual averments in the application for extension of time, the respondent maintained that the historical issues mentioned by the appellants were academic because the appellants had accepted to pay the agreed amount. The respondent denied that it had accepted the alleged saleable property as security. It said that the order of 30 October 2017 was clear. The respondent sought an order dismissing the application for extension because no good cause was shown. They also sought an order dismissing the appellants' action.

[33] On 12 March 2018, the court *a quo* decided that rules 32(9) and 59(4) and (5) were inapplicable to the application to furnish security. The court ordered as follows:

3. [Appellants] (Atlantic and Marketlink) shall provide the N\$1 000 000.00 security to the [respondent] on or before 25 April 2018.
4. In the event of [appellants failing] to provide the security as aforesaid, their claims/defences against [respondent], will be struck from the roll and their proceedings will be dismissed.'

In its reasons for the order (provided on 22 March 2018), the court clarified that this order placed the appellants 'on terms to provide the N\$1 million security to the [respondent] on or before 25 April 2018'.

[34] The further correspondence between the parties showed that the appellants made another offer to the respondent on 20 April 2018, to register a notarial bond over a machine described as 'Cryovac VS90 Vac'. It was said that the conservative value of the machine was estimated at N\$2,8 million. The appellants contended that rule 59 did not dictate the nature and form of security but only required the security in the amount demanded. They stated that the offer made met the requirement. On the same date, the respondent replied and rejected the offer on the basis that the movable asset would depreciate over time and would accordingly not provide the necessary protection.

[35] The appellants addressed another letter dated 23 April 2018 to the respondent stating their preparedness to make unencumbered movable assets (all with serial numbers), to the value of N\$4 million at the time, available to the respondent. They suggested that the assets could be viewed every 12 months and that if depreciated to an extent that they could not provide sufficient security for the N\$1 million the amount could be supplemented. The respondent replied on 24 April 2018. Steadfastly, it insisted on the payment of security in compliance with the court order and indicated that no further discussion would be entertained in terms of assets offered as security. In their status report filed on 26 April 2018, the appellants insisted that the security offered in the form of the movable assets was in compliance with the court order.

[36] The respondent filed a status report on 8 June 2018 stating, among other things, that the appellants ignored the order in terms of which they were

unequivocally ordered to provide security in the amount of N\$1 million. It sought an order dismissing with costs the appellants' main claim under Case No I 2460/2004 and their defences to the respondent's claim under Case No I 1758/2007.

[37] On 18 June 2018, the court *a quo*, having read the parties' respective status reports filed on 26 April and 8 June 2018, the previous court orders and its reasons given on 12 March and 22 March 2018 together with other documents filed of record made the following order, which is the subject matter of this appeal:

1. The claims of [the appellants] in Case No: I 2175/2004 are hereby dismissed due to their failure to pay the agreed security of N\$1 000 000.00 on or before 25 April 2018 as ordered.
2. The costs in the above matter are to stand over for argument at a later stage.
3. A status hearing in Case No: I 2175/2004 is scheduled with a status hearing in Case No: I 1758/2007 (in order to schedule a hearing in respect of [the respondent's] application for summary judgment filed during September 2007 in respect of Case No: I 1758/2007.
4. The aforesaid status hearing shall be held at 16 July 2018 at 12h00, SADC Court.
5. The parties shall file a comprehensive status report concerning arguments in both matters on or before 12 July 2018.'

[38] The court *a quo* erroneously dismissed the appellants' claim under Case Number 'I 2175/2004' due to their failure to 'pay the agreed security of N\$1 million on or before 25 April 2018 as [was] ordered'. As was amplified in the reasons for that order it became apparent that the court had made an error by referring to Case No I 2175/2004. Unquestionably, the court meant to refer to the appellants' action instituted under Case No I 2460/2004, as the security issue related to that claim. This much was made clear in the reasons given during the status hearing on 16 July 2018.

[39] Correctly, the court *a quo* said that it would have been irregular to strike the defence in respect of the respondent's action (ie their defences to the respondent's overdraft facility action under Case No I 1758/2007). The punitive costs sought were deferred and the status hearing regarding that aspect was scheduled with the status hearing in the respondent's summary judgment application under Case No I 1758/2007. The parties were ordered to file a comprehensive status report on 12 July 2018 concerning argument in the two matters for a scheduled status hearing on 16 July 2018.

#### On appeal

[40] The appellants applied for condonation of the late filing of the appeal record and the bond of security as well as the reinstatement of the lapsed appeal. The application for condonation for the late filing of the record itself was filed approximately two and a half months late but nothing was said about the delay. The appellants also sought condonation for the late filing of their heads of

argument, the late filing of their replying affidavit to the respondent's answering affidavit and for the late filing of their bundle of authority. The respondent's answering affidavit in opposition to the appellants' applications for condonation and reinstatement was filed on 1 February 2019. The appellants filed their replying affidavit thereto a year later, on 20 February 2020. In their affidavit, the appellants asserted that the respondent's answering affidavit was not brought to their attention by their erstwhile legal practitioner. With regard to the late filing of the heads of argument together with the bundle of authorities, the appellants' explanation is that they understood rule 17(1) of the Rules of this Court to mean that heads of argument are to be filed 'not more than 21 days before the hearing', but that they were advised by their current legal practitioner that their interpretation may be wrong. The appellants also filed what they referred to as a 'supplementary affidavit in respect of incorrect facts in respondent's heads of argument and annexures'. This, so the appellants explained, was done in the event that the court gives consideration to the argument in the legal practitioner for the respondent's heads of argument that advances a narrative that 'the appellants' appeal was yet another process in the already multiple failures to provide security'.

[41] The respondent's papers in opposition to the appeal, to the application to condone the late filing of the appeal record and to reinstate the appeal as well as to the late furnishing of security on appeal were late by one day. It sought condonation for the lateness.

[42] On the merits, the appellants submitted that the court *a quo* misdirected itself by failing to exercise its discretion judicially when dismissing their action instituted in 2004. The respondent opposed the appeal and argued that the appellants ought to have obtained leave to appeal as the order *a quo* was not final in effect. It also opposed the condonation of the late filing of the appeal record and furnishing of security on appeal and sought the dismissal of the appeal with costs. The respondent contended that there were no prospects of success and that the appellants failed to show good cause why the delayed filing of the appeal record and furnishing of security on appeal should be condoned.

#### Issues

[43] The preliminary issues are whether (a) the order *a quo* is appealable as of right or whether the appellants ought to have obtained leave to appeal; (b) the late filing of the answering affidavit should be condoned; (c) the late filing of the appeal record and furnishing of security on appeal should be condoned; and (d) the appellants' late filing of replying affidavit, heads of argument and the bundle of authority should be condoned. On the merits, if condonation sought by the appellants is granted, whether the High Court failed to exercise its discretion judicially when it dismissed the appellants' claim. Fundamentally, the issue for determination is whether the court *a quo* adopted a drastic step in dismissing the appellants' main claim.

#### Appealability

[44] The issue of appealability has no merit and should be disposed of quickly. The respondent misread the order. It lost sight of the case in respect of which the order appealed against was made as well as the clarification made by the court during the status hearing on 16 July 2018. It is that order in terms of which the appellants' claim, Case No I 2460/2004, (main action) was dismissed. This was buttressed by the respondent's own assertion in the opposing affidavit that in dismissing the appellants' case due to failure to provide security as agreed between the parties, the order was giving effect to the overriding objectives of case management. The further case management conference was in respect of the respondent's action (as defended by the appellants) for the monies lent and advanced to the appellants and which had not been repaid hence the claim under Case No I 1758/2007 (followed by an application for summary judgment) which, as correctly stated by the respondent in its opposing affidavit, was still active in the High Court.

Condonation: Applicable legal principles

[45] I deal first with the trite principles on condonation and then respondent's condonation application followed by the appellants' application. The jurisprudence of this court on condonation is settled. In *Arangies t/a Auto Tech*<sup>7</sup> this court said:

'The application for condonation must thus be lodged without delay, and must provide a full, detailed and accurate explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include —

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<sup>7</sup> *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5 (*Arangies*).

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant and inexplicable.<sup>8</sup>

[46] The frequency of failures to comply with the rules and the consequent deleterious effects on the administration of justice has also been addressed by this Court.<sup>9</sup> For an example, in *Shilongo* this Court, Chief Justice Shivute, remarked:

‘In spite of observations in the past that the court views the disregard of the rules in a serious light, the situation continues unabated and the attitude of some legal practitioners appears to be that it is all well as long as an application for condonation is made. Such attitude is unhelpful and is to be deprecated.’<sup>10</sup>

[47] It is indeed so that condonation is not there for the taking. It is not a mere formality. The other interests implicated include the convenience of the court, the respondent's interest in the finality of the matter, the frequency of the non-compliances with the rules and the interlocutory applications filed as well as the

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<sup>8</sup> See *Beukes & another v SWA Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC 14 (5 November 2010) para 13; *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) para 9. See also *Balzer v Vries* 2015 (2) NR 547 (SC) para 21.

<sup>9</sup> See for an example *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC); *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) (*Shilongo*).

<sup>10</sup> Para 5



delay in the adjudication of the real merits of the case.<sup>11</sup> This Court has also repeatedly stressed that an applicant's explanation for the non-compliance must not only be full, detailed and accurate but should also cover the entire period of non-compliance.<sup>12</sup>

#### Application of the principles to the facts

##### *Late filing of the respondent's opposing affidavit*

[48] The explanation for the delay was said to have been occasioned by the incorrect diarising of the date when same was due for filing and that the junior legal practitioner for the respondent to whom the responsibility to effect corrections in the document had been assigned, failed to do so because she had attended court for the JCM conference on 31 January 2019, the day the document was due for filing. The appellants have not suggested that the delay was prejudicial to them. The respondent's explanation for the delay is satisfactory and reasonable. I would condone the delay.

##### *Late filing of appeal record*

[49] I mention at the outset that the resolution of the dispute regarding security for costs has lingered for a long time. The order appealed against was made on 18 June 2018 as amplified by the High Court's reasoning provided during the status hearing on 16 July 2018. The notice of appeal was filed on 31 July 2018. Rule 8 of the Rules of this Court, dealing with the filing of the appeal record, is couched in a peremptory language: An appellant in a civil case 'must' file copies of the record of

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<sup>11</sup> *Id* para 5 and para 6.

<sup>12</sup> *Shilongo* para 7.

proceedings within three months of the date of the judgment or order appealed against.<sup>13</sup> The record ought to have been filed on 18 September 2018 but was only filed about two months later, on 20 November 2018, without an application for condonation. The application was lodged on 17 January 2019. The explanation for its lateness was never given.

[50] The record was allegedly given to the Hibachi Transcribers in August 2018 but no proof to that effect was attached. The explanation is indeed wanting as to when in August the record was given to Hibachi. Allegedly, follow-up-calls with Hibachi were made during September and October 2018. Again, there is no accurate explanation regarding the alleged follow-up-calls. This could have been an easy matter for the appellants' legal practitioners to substantiate. They did not.

[51] Evident from the correspondence between the transcribers and the appellants, the index was forwarded to the appellants' legal practitioners on 19 October 2018. The index was then sent to the respondent's legal practitioners on 24 October 2018 for confirmation of its correctness. Already by this time, the three months period had expired. A day after the sending of the index to the respondent, on 25 October 2018, the registrar addressed a letter to the appellants' legal practitioners stating, among other things, that the appeal was deemed to have been withdrawn due to non-compliance with the rules in terms of filing of the record and security. When the appellants addressed another letter dated 31 October 2018 to the respondent for confirmation of the correctness of the index,

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<sup>13</sup> In terms of sub-rule (2)(b).

the appeal had already lapsed. Therefore, the appellants' attempt to shift the blame to the respondent for its alleged failure to confirm the correctness of the index is pointless.

[52] The appellants stated that the late filing of the appeal record was allegedly due to the remissness on the part of the transcribers in effecting numbering, indexing and binding. It is explicated that the transcribers were overworked. Even so, there is no explanation whatsoever why it took Hibachi almost three months to complete a record of one volume. Moreover, there is no affidavit from Hibachi to confirm the allegations concerning it. Disingenuously, the appellants disavowed any responsibility for the delayed record. As *dominus litis* they had a duty to file the record timeously. In an instance where they allegedly experienced difficulties with the filing of the record, they could have approached the respondent for an extension of time within which to file the record as provided for in rule 8(2)(c) of the Rules of the Supreme Court. This was clearly not done and no explanation for the neglect has been offered. On balance, the lack of specificity in the appellants' affidavit and their failure to properly address the lengthy delay cannot be countenanced. The explanation is unacceptable.

*Late furnishing of security on appeal*

[53] The reason advanced for the late furnishing of security was that although the funds for the security were transferred in time from First National Bank South Africa to the trust account of the appellants' legal practitioners, such funds never went through. Without explanation, the funds reappeared some days later in the

appellants' account. Significantly, no explanation whatsoever was given why the appellants did not verify with the bank why the funds never went through and reappeared later. They stated that to avoid a further delay, a transfer was made from another bank but there was a further delay because of the time the money would appear in the recipient's bank account. The security was furnished on 4 November 2018. The appellants contended that the respondent did not suffer prejudice because of the delayed payment of security. There is clearly no merit in this submission. The respondent has explained the prejudice it suffered: being dragged to court in the never-ending litigation by the appellants. Similarly, the explanation proffered is wanting and unacceptable, to say the least.

*Late filing of replying affidavit, heads of argument and bundle of authorities*

[54] It can also be recalled that the appellants also sought condonation for the late filing of their heads of argument, the late filing of their replying affidavit to the respondent's answering affidavit and for the late filing of their bundle of authority.

[55] As to the late filing of the replying affidavit, the appellants stated that the respondent's answering affidavit was not timeously brought to their attention by their erstwhile legal practitioner and as a result, the reply thereto was filed outside the prescribed time frame. The appellants further stated that their failure to timeously file the heads of argument together with the bundle of authorities was as a result of their incorrect understanding of the court's rule relating to the time frame for filing heads of argument.

[56] The appellants have flouted too many rules of court. They now seek to apportion blame on their erstwhile legal practitioner who, so we were informed, had been suspended from practice and was not in court to defend himself or to present his version of events. Overall, the appellants' multiple applications for condonation are symptomatic of their disdainful attitude towards the rules of court. The explanations they gave for the various infractions of the court rules are unconvincing and appear contrived. They are simply unacceptable.

#### Prospects of success

[57] It is trite that an applicant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. In determining whether to grant condonation, a court will consider whether the explanation given is sufficient and will also consider the applicant's prospects of success on the merits, save in cases where the non-compliance with the rules is so glaring, flagrant and inexplicable that the prospects of success need not even be considered.

[58] I have in the preceding paragraphs dealt with the first consideration, which is the explanation offered for the non-compliance. I now proceed to deal with the second consideration, whether there are reasonable prospects of success on the merits.

[59] The appellants contended that there are reasonable prospects of success because the High Court failed to exercise its discretion judiciously and judicially. It

is correct that the managing judge had discretion whether to dismiss the proceedings instituted or not. Alternatively, the judge could have made *any* order he considered suitable or proper especially given that the security was not given within the stipulated period in terms of the applicable rule. However, as will become plain below, I do not agree that the court *a quo* failed to exercise its discretion at all.

[60] It is trite that appellate courts do not lightly interfere with lower court's exercise of discretion unless the discretion has been exercised capriciously or on a wrong principle. This principle was restated by this court in *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others*<sup>14</sup> as follows:

' . . . It is well settled that a court of appeal would be slow to interfere with [the Court a quo's] exercise of discretion "unless a clear case for interference is made out. . . . The power to interfere on appeal . . . is strictly circumscribed. It is considered a discretion in the strict or narrow sense, ie a discretion which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself.'"<sup>15</sup>

[61] In terms of the relevant rule, the security for costs *a quo* ought to have been furnished within ten days of the order dated 18 June 2018 (the order and judgment appealed against). Sadly, the security has, to date, not been paid. In its amplifying reasons the court *a quo* made it clear that the respondent 'was not interested in

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<sup>14</sup> 2013 (3) NR 664 (SC) (*Rally*). See also the South African Constitutional Court's decision in *Giddey No v J C Barnard and Partners* 2007 (5) SA 525 (CC) at p 535.

<sup>15</sup> *Rally* para 106.

guarantees, [but] wanted the money'. In view of the appellants' stance that rule 59 does not dictate the nature and form of security but only requires the providing of security in the amount that was sought, the High Court clarified that what was at stake was not the provision of security but the payment thereof to the respondent.

[62] Summing up, when granting the order, the court *a quo* explicitly stated that it caused a status hearing notice to be issued for the parties to attend court on 11 June 2018 to establish whether the appellants had complied with the direction to pay security to the respondent as per its previous order dated 12 March 2018. The High Court further remarked that it read the respective status reports filed on 26 April 2018 and 8 June 2018 and its orders and reasons given 12 March 2018 and 22 March 2018, respectively, as well as the other documents filed of record – since August 2017. This is the date on which the application for security for costs was lodged.

[63] The analysis of the background of the protracted litigation stated above is revealing. The order for payment of security was made in 2018 meaning that the appellants have been in default of payment of security since 12 March 2018 to date. The appellants kept on moving the goalpost by contending, among other things, that rule 59 does not dictate the nature and form of security and that it does not mention the word 'payment'. They argued, also, that the amount of security sought, (N\$1 million), was exorbitant.

[64] The appellants also moved hither and thither – offering attached immovable property situated in South Africa and not owned by them. As if that was not enough, they later offered movable asset, a machine whose value was unquestionably likely to depreciate over time. Besides, they could not explain why they did not sell the machinery themselves to pay security as agreed and ordered by court. Wisely, in my view, the respondent saw through the apathetic appellants and rejected the inadequate offers to furnish security for costs. The disregard of the court order is, in the circumstances, inexcusable and cannot be tolerated. It is not insignificant that the appellants have not to date paid the security for costs.

[65] The lawsuit, in respect of which security for costs was not only agreed upon but also ordered by the court *a quo*, began in 2004. The dispute in that matter remains unresolved. Evidently from the litigation background set out above, the litigation has been fraught with endless delays, innumerable interlocutory applications including the application for security for costs that has resulted in the order that is the subject of this appeal.

[66] More importantly, it is necessary to mention the overriding objective of the rules of court and the JCM. The former are aimed at facilitating the resolution of the real disputes in litigation justly and speedily, efficiently and cost effectively by, *inter alia*, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and expeditious disposal of the real dispute and to save judicial time and resources.<sup>16</sup> The principal objectives of JCM are, among other things, to

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<sup>16</sup> See rule 1(2) and (3) of the High Court Rules.



ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes and increase the cost effectiveness of the civil justice system and to eliminate delays in litigation.

[67] Plainly, the appellants' manner of litigating since the institution of their action in 2004 flew and interminably flies in the face of the above-mentioned objectives. One wonders how, given that context, it can reasonably be said that the High Court exercised its discretion wrongly. As far as one could ascertain, the appellants did not seek condonation or at least explain why the application was not lodged without delay. The multiple disregards of the court rules and court orders as shown above are unacceptable.

[68] With the above principles in mind, coupled with the analysis of the context, the orders *a quo* and reasons therefor as well as the above appraisal of the matter, I am satisfied that the court *a quo*'s exercise of discretion was not misdirected at all. It follows that there are no prospects of success on appeal. The appellants' applications for condonation and reinstatement of appeal must therefore be refused.

#### Costs

[69] In the answering affidavit the respondent asked this Court to order punitive costs, *de bonis propriis*, against Mr Mueller of Mueller Legal Practitioners who represented the appellants in the litigation in the court *a quo* and who allegedly advised the appellants to prosecute the appeal. In argument, the respondent did

not persist with the proposed punitive costs against Mr Mueller. In any event, it is a trite principle for which no authority is required that a punitive order of costs *de bonis propriis* is not, generally, lightly ordered. Besides, this aspect of costs was not properly aired by the parties during oral argument.

[70] The respondent asked for the dismissal of the appeal with costs. This submission is obviously made in the event that the applications for condonation and reinstatement succeed. Thus, as the appeal has lapsed and the applications for condonation and reinstatement have not succeeded there is self-evidently no appeal to dismiss. Doubtless, the respondent has attained a great measure of success on appeal. There is, therefore, no reason why costs on appeal should not follow the result.

#### Order

[71] In the event, the following order is made:

- (a) The respondent's delay in filing the answering affidavit is condoned.
- (b) The applications for condonation and re-instatement of the appeal are dismissed with costs.

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SHIVUTE CJ

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MOKGORO AJA

APPEARANCES

APPELLANTS:

G Narib

Instructed by Delport Legal Practitioners

RESPONDENT:

E M Angula

Of AngulaCo Incorporated