



REPORTABLE

CASE NO: SA 76/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARÉN BRYNARD DE KLERK

Appellant

and

JOHAN ANDRE PENDERIS

First Respondent

PHILLIPUS VILJOEN ELLIS

Second Respondent

ADOLPHINE MUSHIMBA

Third Respondent

JUNE WAILLING

Fourth Respondent

DESIREE REVIGLIO

Fifth Respondent

DANILO MIWA REVIGLIO

Sixth Respondent

DOMINIQUE GUISEPHINE REVIGLIO

Seventh Respondent

THE MASTER OF THE HIGH COURT OF NAMIBIA

Eight Respondent

PIETER DANIEL THERON

Ninth Respondent

BORRIS ERASMUS

Tenth Respondent

STOAN HORN

Eleventh Respondent

CELESTE COETZEE

Twelve Respondent

PETRUS GERHARDUS STRAUSS

Thirteenth Respondent

NORMAN TJOMBE

Fourteenth Respondent

Coram: DAMASEB DCJ, MAINGA JA and ANGULA AJA

Heard: 07 November 2022

Delivered: 1 March 2023

Summary: Condonation applications – there is a strong interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance of a rule of court and the reasonable prospects of success on appeal.

Condonation may be refused where a litigant has provided a good and acceptable reason for his or her non-compliance but has failed to convince the court that there are reasonable prospects of success on appeal. On the other hand, good prospects of success on appeal may lead to a condonation and reinstatement application being granted in spite of the fact that the explanation for the non-compliance is weak or not entirely satisfactory.

As a result of the appellant's multiple non-compliances with the rules of this court, he was obliged to file an application for condonation and reinstatement of his appeal. The application was filed on 1 November 2022 – three court days before the date of

hearing of the appeal. The respondents opposed the application. When the matter was called, counsel were ordered to argue the application for condonation only and depending on the outcome of the application, to address the court on merits at a later stage.

Held, the first dictate is that an application for condonation must be brought as soon as the non-compliance has been detected. Second, the applicant must provide a reasonable and acceptable explanation for his or her non-compliance and show that the main matter has prospects of success. Third, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable and fourth, the *bona fide* of the application has also been held as a factor to be taken into account by the court in exercising its discretion on whether to grant condonation or to refuse condonation.

Held, that the cumulative effect of the appellant's multiple non-compliances with rules are so glaring, flagrant and inexplicable so much that the application would have been refused without the court considering the prospects of success.

Held, in any event, the appellant failed to address the question of whether his appeal enjoys good prospects of success and such failure is fatal to the appellant's application for condonation.

Accordingly the application for condonation and re-instatement is refused and struck from the roll with costs.

APPEAL JUDGMENT

ANGULA AJA (DAMASEB DCJ and MAINGA JA concurring):

Introduction

[1] This appeal concerns the removal of the appellant by the High Court order as executor of three deceased estates which he was administering prior to his abrupt

departure from Namibia and his subsequent inordinate absence from the country. The High Court declared him as a fugitive from justice and ordered him amongst other things, to surrender to the Master of the High Court his letters of appointment as executor of the said three estates. The appeal is in essence against the order declaring the appellant as a fugitive from justice as well as resultant costs orders.

Factual background

[2] The appellant is Mr. Marèn Brynard de Klerk, an admitted legal practitioner in Namibia. Prior to the event that gave rise to the proceedings in the court *a quo*, the appellant was practicing as a legal practitioner, at Windhoek. He was practicing as a senior director and shareholder together with the 11th, 12th and 13th respondents ('the DHC respondents') under the name and style of De Klerk, Horn and Coetzee Incorporated (DHC Incorporated). It would appear that the law firm has in the meantime been dissolved as a result of the appellant's long absence from Namibia.

[3] While the appellant was practicing, he was appointed by the Master of the High Court as executor of three estates, namely, estate late Mushimba, estate late Reviglio and estate late Penderis ('the estates'). During November 2019, the international television channel, Al Jazeera, broadcasted a documentary concerning allegations of corruption in Namibia's fishing industry, including alleged acts of bribery and money laundering. The allegations came to be known as the 'Fishrot Scandal'. The appellant was alleged to have been involved in the said scandal and his arrest by the law enforcement agencies was imminent. His name and photographs were published in the local print media. In the wake of those allegations

the appellant abruptly left Namibia in early January 2020. He has been absent from the country ever since.

[4] The first to seventh respondents then launched an urgent application in the High Court in which they sought orders *inter alia*: declaring that it was undesirable, within the meaning of s 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 for the appellant to continue to act as an executor of the estates; removing the appellant as trustee of the ABP Trust; declaring the appellant to be incapable of holding office as an executor during his life time; and ordering the appellant to pay the costs of the application. During the course of the proceedings the appellant resigned as trustee of the ABP Trust and the Mushimba Family Trust. He, however, refused to resign as executor of the estates.

[5] The appellant opposed the application from his hiding in South Africa. In opposition to the relief sought, the appellant denied that he was unfit to hold office as an executor or that his absence from Namibia was because of his alleged involvement in the Fishrot scandal. According to the appellant, the allegations connecting him to the Fishrot scandal have impacted his health as a result of which he was hospitalised. Furthermore, he received several threats to his life and that he believes his life would be in danger if he were to return to Namibia. He was receiving ongoing care from mental health care professionals and therefore his absence from Namibia was occasioned by reason that he was undergoing medical treatment in South Africa.

[6] The appellant further denied that he was neglecting his duties as an executor or as trustee. He asserted that notwithstanding his absence from Namibia, he

continued to perform all his duties as executor of the estates concerned. In respect of the Mushimba estate he alleged that it was about 95% complete while the Reviglio estate was about 70% complete. The appellant pointed out that during March 2020, he appointed third and fourth respondents as his agents in Namibia in respect of the administration of the estates concerned.

Approach by the High Court

[7] The court decided to first determine the legal point that was raised *in limine* by the respondents before it could consider the merits. The court took the view that if the point *in limine* was upheld it might bring the proceedings to an end. The point was twofold: First whether the appellant was a fugitive from justice; Second, if it was found that he was indeed a fugitive from justice, whether he did have the *locus standi* to oppose the application.

[8] In considering the meaning and import of the concept 'fugitive from justice' the court conducted a survey of various leading judgments in the sub-region including South Africa, Zimbabwe and Lesotho. At the end of that exercise, the court found that a fugitive from justice is a person who escapes or hides from justice. The court then proceeded to consider whether on the facts before it and the submission advanced by counsel for the parties, the appellant could appropriately be said to be a fugitive from justice. The court concluded that it was satisfied on a balance of probabilities that the appellant was a fugitive from justice.

[9] The court then turned to consider whether the appellant, as fugitive from justice had the necessary *locus standi* in the sense of whether he was entitled to be heard by the court in his opposition to the relief sought against him by the applicants.

[10] Again, the court embarked upon a comparative study of various leading judgments on whether a fugitive from justice is entitled to be heard by a court. It considered the judgments from the United States of America, England and from the Southern African sub-region. At the end of that the exercise, the court decided to adopt the approach by the courts in the sub-region in particular the *Mulligan* judgment.¹

[11] The court observed that the regional approach is based on the *Mulligan* judgment which held that a court in the exercise of its inherent jurisdiction may refuse to allow its process to be accessed by a fugitive from justice. In the application of its inherent jurisdiction, a court must exercise its discretion carefully having regard to the constitutional dictates which vest the right in persons to have access to court to enforce their rights or determine their disputes. It should therefore only be in the gravest or exceptional cases that a court should disentitle a fugitive from justice to access its process.

[12] The court then proceeded to consider whether the facts before it were exceptional or grave, justifying it to exercise its inherent discretion to non-suit the appellant. The court concluded that the facts before it were exceptional, entitling it to non-suit the appellant on account of his status as a fugitive from justice which meant

¹ *Mulligan v Mulligan* 1925 WLD 164; *Escom v Rademeyer* 1985 (2) SA 658; *Mawere v Minister of Justice*, *Legal Affairs* (Civil Appeal No.158/05 (Civil Appeal No.158/05) [2008] ZWSC 12 (10 September 2008); *Attorney –General v Spencer and Another* S.C 94/2000,Crim. Appeal No 197/99.

that the appellant lacked the necessary *locus standi*. The application was accordingly decided on the applicant's papers only.

[13] In the end, the court *a quo* declared that it was undesirable that the appellant should continue to act as an executor of the three mentioned deceased estates and ordered the appellant to surrender to the Master of the High Court the letters of executorship in respect of the said estates. The court further ordered the Master of the High Court to appoint suitable persons as executors for the estates within four weeks from the date of the order. The appellant was ordered to pay the costs of the applicants as well as the costs of the DHC respondents. It is against those orders and finding that the present appeal is directed.

The grounds of appeal

[14] The appellant's main grounds of appeal can be briefly summarised as follows:

- (a) That the court *a quo* erred by finding that the respondents had raised the point that the appellant did not have the *locus standi* to oppose the application whereas on the respondents' papers the appellant was not called upon to meet such case. And furthermore, by allowing the DHC respondents to make comprehensive arguments on the said point and thereby resulting in the said respondents securing a declaratory relief against the appellant;

- (b) That the court *a quo* erred in relying on inadmissible hearsay evidence to make a finding that the appellant is a fugitive from justice. And furthermore by evaluating the appellant's evidence, aimed at explaining his absence from

Namibia, in the context of section 54 of the Administration of Estates Act, 1965, for the purpose of determining whether or not the appellant was a fugitive from justice. It is asserted that the court did so in the circumstances where the appellant was not called upon to answer such case;

- (c) That, even it were to be assumed that the appellant was a fugitive from justice, the court *a quo* erred in finding that the appellant did not have the *locus standi* to oppose the application thereby infringing upon the appellant's constitutional right to fair trial in terms of article 12 of the Constitution, on account of finding that the appellant lacked *locus standi*;
- (d) That the court *a quo* erred by failing to properly apply the legal principles applicable to the doctrine of 'fugitive from justice';
- (e) That the court *a quo* erred in awarding costs to the DHC respondents under circumstances where there was no *lis* between the appellant and the DHC respondents; and
- (f) That the court *a quo* erred in law and/or in fact in awarding costs to the applicants (*a quo*) in circumstances where the applicants had abandoned the declaratory relief they initially sought; and further sought an incompetent order namely to direct the Master of the High court to appoint a nominated person as an executor in the place of the appellant; and where the appellant had achieved proportionate success.

Issues for determination on appeal

[15] The issues to be determined in this appeal are in essence the same point of law that was decided by the court *a quo* namely whether the appellant is a fugitive from justice. If so, whether he has the *locus standi* in the sense that he should have been allowed access by the court *a quo* in order to vindicate his rights. Before considering those issues the court has first to consider the appellant's application for condonation and reinstatement of the appeal.

Application for condonation and reinstatement of the appeal

[16] As a result of the appellant's multiple non-compliances with the rules of this court, he was obliged to file an application for condonation and reinstatement of his appeal. The application was filed on 1 November 2022 – three court days before the hearing of the appeal. The respondents opposed the application. When the application was called, in the view the court took with regard to the application counsel were requested to argue the application for condonation only and depending on the outcome of the application, to address the court on merits at a later stage.

[17] A number of the appellant's non-compliances with the rules were raised in the two sets of heads of arguments filed on behalf of the respondents. This was because by the time the respondents' heads of arguments were filed no application for condonation had been filed by the appellant.

[18] The first to seventh respondents raised two points *in limine*. These were that the appellant failed to comply with rule 17(1) and 17(7)(f) by failing to file his heads of argument not more than 21 days before the hearing and furthermore by failing to file a list of authorities. The DHC respondents raised further points *in limine* in addition to the points *in limine* raised by the first to seventh respondents. These include the fact that the appeal record was filed late without any written consent by the DHC respondents as contemplated by rule 8(2)(c) and therefore the appeal was deemed to have been withdrawn as contemplated by rule 9(1)(b); that the appellant failed to file any security for costs in respect of the DHC respondents; that the appellant failed to comply with rule 11 in that volume 6 of the bundles filed, exceeds the prescribed 120 pages as it consists of 170 pages; that the appellant failed to apply for leave to appeal in respect of the order of costs granted in favour of the DHC respondents contrary to rule 18(3); and that the appellant failed to address the issue of prospects of success.

[19] In response to the points *in limine* raised in the respondents' heads of argument relating to the appellant's non-compliance with the rules, the appellant filed an application for condonation on 1 November 2022 about three court days before the appeal was due to be heard on 7 November 2022. The appellant sought orders to condone his non-compliance with the court's rules as pointed out by the respondents.

[20] As a result of the late filing of the application for condonation the respondents were put under pressure to file their answering affidavits. They filed their answering affidavits three days thereafter on 4 November 2022.

[21] The legal principles a court is to take into account in considering whether or not to exercise its discretion to condone a party's non-compliance with the rules of court are well-established. They were restated in *Paulo*² relying on *Telecom*.³ The first principle is that an application for condonation must be brought as soon as the non-compliance has been detected. Second, there is some interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance of a rule of court and the reasonable prospects of success on appeal.

[22] The appellant must provide a reasonable and acceptable explanation for his or her non-compliance and must show that the appeal has prospects of success. An application for condonation may, however, be refused where an appellant has provided a good and acceptable reason for his or her non-compliance but has failed to convince the court that there are reasonable prospects of success on appeal. Third, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide on the condonation application without having regard to the prospects of success on appeal. Fourth, the *bona fides* of the application has also been held as a factor to be taken into account by the court in exercising its discretion whether to grant condonation or to refuse condonation.

[23] With those principles in mind, I turn to consider the points *in limine* in conjunction with the explanation tendered by the appellant in his founding affidavit together with the respondents' opposition contained in their respective answering

² *Prosecutor –General v Paulo and Another* 2020 (4) NR 992 para [21] and [22].

³ *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC).

affidavits in order to determine whether the appellant has made out a case for the relief sought with regard to his condonation application. The points will be considered in no particular order.

Record filed late

[24] Rule 8(2)(b) of the Rules of this court provides that the record of the proceedings appealed from, must be filed within three months from the date of the judgment or order appealed against. It is common cause in the present matter that the judgment appealed against was delivered on 3 September 2020. The record ought to have been delivered not later than 3 December 2020. The record was delivered on 15 December 2020. There was, however, an agreement as contemplated by rule 8(2)(c) between the appellant's legal practitioner and the legal practitioners for the first to seventh respondents to file the record by 15 December 2020. There was, however, no such agreement between the appellant and the DHC respondents.

[25] In this regard the eleventh respondent pointed out in his opposing affidavit that the appellant stated in his founding affidavit that 'Only one notice to oppose was filed on 8 October 2020 by the first to seventh respondents to the appeal.' The 11th respondent pointed out in this regard that the statement seemed to suggest that the appellant did not know that the DHC respondents were parties to the appeal. In refuting the appellant's insinuation the 11th respondent pointed out that appellant's legal practitioner telephoned him on 17 October 2020 and enquired when the DHC respondents' heads of argument would be filed. To which the 11th respondent responded that it would be filed on 21 October 2020. The 11th respondent further

pointed out that a copy of the record as well as the appellant's heads of argument were also served on them i.e. the DHC respondents.

[26] In my view the appellant's feeble attempt to suggest that the record was not filed on time on the DHC respondents because he did not receive a notice to oppose from them, is disingenuous and demonstrates lack of *bona fide* on his part. I find it rather startling for the appellant to state under oath that 'the record was filed timeously in terms of the provisions of rule 8(1)(c) on 15 December 2020' while he knew or ought reasonably to have known that no agreement in terms of rule 8(2)(c) was made by his legal practitioner with the DHC respondents regarding the late filing of the record. The appellant's disingenuity in this regard is exposed by the fact that he was prepared to state in detail the agreement in terms of rule 8(2)(c) his legal practitioner had made with the legal practitioner for the first to seventh respondents but said nothing about any agreement made by his legal practitioner with the DHC respondents.

[27] The appellant did not seek condonation for his late delivery of the record on DHC respondents. It follows therefore, in my view that the appellant is deemed to have withdrawn his appeal, as against the DHC respondents, as contemplated by rule 9(1)(b). The point *in limine* that the appeal record was filed late on the DHC respondents without agreement in terms of rule 8(2)(c) is upheld in so far as it relates to the DHC respondents. For that reason alone the appeal is liable to be struck from the roll with costs in so far as it relates to the DHC respondents. I proceed to consider the next *point in limine*.

Appellant's failure to file security for costs for the 11th to 13th respondents.

[28] Rule 14(2) requires an appellant, before he or she lodges copies of the record to enter into good and sufficient security for the respondent's costs unless the respondent waives the right to security within 15 days of receipt of the appellant's notice of appeal. It is common cause in the present matter that the appellant's legal practitioner and the legal practitioner for the first to seventh respondents agreed to the amount of security for costs and that a bond of security in the sum of N\$150 000 was issued by the legal practitioner for the appellant in favour of the first to seventh respondents. It is further common cause that the DHC respondents did not waive their rights to security as contemplated by rule 14(2)(a).

[29] Notwithstanding the fact that the issue of security for costs was raised in the heads of argument filed on behalf of the DHC respondents, the appellant failed to provide an explanation in his founding affidavit why he failed to enter any security for the costs for DHC respondents. He further failed to specifically pray for condonation for his failure to provide security for costs in respect of the said respondents.

[30] The appellant was not oblivious to the fact that the DHC respondents required security for their costs. He was aware that the said respondents were granted a cost order in their favour by the court *a quo*. As a matter of fact, in this appeal the appellant prayed for an order setting aside that cost order. In this regard, counsel for the DHC respondents correctly, in my view, pointed out that the right to security for costs for these respondents is important and material given the fact that the appellant is hiding outside the jurisdiction of this court which makes the execution of the cost order against him complicated if not impossible.

[31] It follows thus that for the reasons outlined above the appeal also stands to be struck from the roll with costs in so far as it relates to the DHC respondents.

Failure to apply for leave to appeal against the cost order made in favour of the DHC respondents.

[32] Counsel for the respondents were *ad idem* that the relief sought by the appellant, against the respondents related only to the order of costs made by the court *a quo* against the appellant in favour the respondents. That is evident from the proposed order sought from this court by the appellant namely, that court *a quo*'s cost order be varied and replaced with an order which reads: 'That the applicants are ordered to pay the costs of the First Respondent such costs to include the costs of one instructing and one instructed legal practitioner and that the 11th, 12th and 13th Respondent be ordered to pay their own costs.'

[33] It bears pointing out in this connection that in the proposed order the appellant has abandoned an order reinstating him as an executor. He further no longer seeks an order setting aside the court *a quo*'s finding that he was a fugitive from justice. Instead he sought a qualified order that at the time of the determination by the court *a quo*, he was not a fugitive from justice. The change of front appeared to have been caused by the fact that a warrant for his arrest has been issued in the meantime, a copy whereof was included in the documents which were placed before court by the DHC respondents in terms of rule 11(4)(b). He further sought an order declaring that he was entitled, as a matter of law, to oppose the application. He did so without asking this court to refer the matter back to the court *a quo*. Given the relief sought

by the appellant, I agree with counsel for the first to seventh respondents' submission that the orders now sought have no practical application and are of academic nature. It is trite that courts do not adjudicate on matters whose outcome is of academic nature and devoid of practical relevancy.

[34] Properly considered, the appeal in essence is against the orders of costs made in favour of the respondents. It follows therefore that there is merit in the DHC respondents point *in limine*, that the appellant was required by section 8(3) of the High Court Act, 1990 to first obtain leave from the court *a quo* to appeal to this court against the cost orders he now appeals against. It is common ground that the appellant failed to apply and obtain leave to appeal from the court *a quo*. It follows thus for that reason alone, the appeal is not properly before this court and thus stands to be struck from the roll with costs.

Failure by the appellant to file his heads of argument timeously

[35] The respondents raised the point *in limine* that the appellant failed to file his heads of argument within the time period prescribed by the rules. Rule 17(1) and (2) prescribes that the appellant must file his heads of argument not more than 21 days before the hearing failing which the appeal shall lapse. In this matter the appeal was set down for hearing on 7 November 2022. Therefore the last day of the 21 days before the hearing was 7 October 2022. This means that the heads should have been filed by not later than 6 October 2022. The appellant's heads of argument were filed four days late on 10 October 2022.

[36] As a reason for the late filing of the heads of argument the appellant ascribed it to 'a calculation error' by him and his legal practitioner, when the heads of argument were due for filing. He went on to say that the application for condonation was launched as soon as was reasonably possible. According to him, any prejudice that might have been suffered by the respondents as a result of the late filing of the heads of argument is 'not of such magnitude that this Honourable Court cannot exercise its discretion to condone the Appellant's non-compliance.'

[37] The appellant failed to explain the so-called 'calculation error'. In my view the margin of error, if any, is too wide - four days. The explanation would have been acceptable if for instance the error of calculation was out with say one day. The 11th respondent correctly points out in this regard that even if the clear days calculation method was applied, the heads of argument should have been filed not later than 7 October 2022. In my view the appellant's explanation is not *bona fide* and is disingenuous. It is rejected. The point *in limine* is well taken and is upheld.

[38] As regard the appellants' claim that the application was launched as soon as was reasonably possible, I do not agree with that contention for the reason that according to the appellant, he and his legal representative only became aware of their calculation error 'once the first to seventh respondents' heads of argument were received on 25 October 2022'. The alleged date of receipt of the said heads of argument is incorrect, whether this was made deliberately or through negligence is not apparent. What is clear is that no effort was made by the appellant to correct that misstatement of fact.

[39] The correct fact is that the first to seventh respondents' heads of argument were served on the applicant's legal representative on 21 October 2022. The application for condonation was only filed on 1 November 2022. Thus 10 ordinary days lapsed before the application for condonation was filed. By any standard a lapse of 10 days is unreasonable. In this regard, counsel for the DHC respondents correctly pointed out that the application's supporting affidavit comprised only of four pages of substantive contents. No explanation has been proffered why such a short application could not be filed earlier. I accordingly hold that the application was not filed as soon as it was reasonably possible after the appellant was made aware of his non-compliance with the rules. Again, for this reason alone the application for condonation stands to be declined.

Failure to file the certificate of foreign authorities in terms of rule 19(1)

[40] Rule 19(1) provides that where a party in his or her heads of argument relies on foreign authorities he or she must simultaneously with the filing of the heads of argument, file a certificate stating that after a diligent search, he or she was unable to find Namibian authority in support of the proposition of law under consideration.

[41] In the present matter, it is common cause that such certificate was not simultaneously filed with the appellants' heads of argument. It is further common cause that counsel for the appellant relied on foreign authorities in his heads of argument. In his explanation for this non-compliance with the said rule, the appellant blamed his non-compliance to administrative failure. It would appear that the omission to include the certificate of foreign authorities rested with the instructed counsel. However, in my view, the instructing counsel was not absolved from

ensuring that the heads of argument complied with rule 19(1). Had he perused the heads of argument, he would have certainly realised that the certificate was missing. In my view, it is not a sufficient nor an acceptable explanation for the appellant and his legal practitioner to simply blame his non-compliance with the rules on an administrative failure - whatever that means - for their non-compliance with the rule.

Failure to comply with rule 21(1)

[42] Rule 21(1) requires a party to lodge a bundle of authorities simultaneously with the lodging of the heads of argument. Again that rule was not complied with in the present matter. According to the instructing legal practitioner for the appellant, the instructed counsel omitted to provide him with the bundle of authorities for filing with the heads of argument. According to him, he only became aware of his non-compliance with the said rule when the respondents' legal practitioner alerted him 'a day or two after the filing of the heads.' Thereafter the bundle of authorities was served and filed on 13 October 2022. I am of the view that the point *in limine* in this regard is well taken and is accordingly upheld.

Failure to comply with rule 11(3)

[43] Rule 11(3) stipulates that each volume of the record must not exceed 120 pages. It is common cause that volume 6 of the record filed comprises 170 pages contrary to what rule 11(3) provides. In an attempt to explain his non-compliance the applicant stated in his affidavit that his legal practitioner had instructed the transcription company to compile the record which 'is well - versed in the rules of this honourable court.'

[44] In my view, the attempt by the appellant to shift the blame to the transcription company, for his non-compliance, demonstrate, the appellant's lack of *bona fide*, and forthrightness. It is well-settled that the responsibility for the preparation of the appeal record rests on the appellant and his or her legal practitioner. Such responsibility cannot be outsourced to the transcription company. In my view, the self-admitted fact that the legal practitioner failed to notice that volume 6 of the record exceeded the prescribed number of pages demonstrates the lack of attention and diligence on the part of the appellant's legal practitioner to ensure that rule 11(3) had been complied with. Such conduct cannot be countenanced by this court.

[45] In addition to the appellant's non-compliance with rule 11(3) the 11th respondent pointed out in his affidavit as well as in their heads of argument that the appellant further failed to comply with rule 11(4)(b) which requires that the record must include 'all documents and exhibits in the case together with a brief statement in the index indicating the nature of the exhibits.' Notwithstanding the fact that this non-compliance had been pointed out in the heads of argument, filed on behalf of respondents, the appellant and his legal representative failed to rectify such omission. As a result of the appellant's non-compliance in that regard, counsel for DHC respondents was obliged to compile an additional bundle of such relevant documents and exhibits which was filed with the heads of argument.

[46] It bears mentioning that among the documents attached to the DHC respondents' heads of argument was an order made by the court *a quo* on 28 July 2020. That order was important and needed to be produced because it was relevant to the first ground of appeal raised by the appellant that the court *a quo* erred in

finding that the appellant had no *locus standi* to oppose the application because he was a fugitive from justice. As can be noted from the grounds of appeal summarised earlier in this judgment, one such ground is that the court *a quo* made the finding that the appellant is a fugitive from justice under the circumstances where the appellant was not called upon to meet that case. Counsel for the DHC respondents pointed out in this regard that such statement or ground was demonstrably false. This was because the issue of fugitive from justice was raised by the appellant himself in his answering affidavit. Thereafter the DHC respondents responded to the appellant's affidavit regarding the issue of fugitive. This prompted the appellant's counsel to apply for leave to file a supplementary affidavit to deal with the issue of fugitive. Such leave was granted by the court in its order of 28 July 2020.

[47] It follows thus, had that court order of 28 July 2020 not been produced by counsel for the respondents, this court would have been left under the wrong impression that the court *a quo* made a finding that the appellant was a fugitive while the point was never raised. The effect of the appellant's non-compliance with rule 11(4)(b) is self-evident. What is disconcerting in this connection is the fact that despite the issue of the appellant's non-compliance with rule 11(4)(b) being raised in the DHC respondents heads of argument prior to the appellant launching his condonation application, the appellant failed to proffer an explanation in his founding affidavit for his non-compliance with the rule in question.

[48] It was correctly submitted on behalf of the DHC respondents that it should in the circumstances be assumed that the appellant had nothing to say. It is to be noted that no condonation has been prayed for this serious non-compliance with the said

rule. Ordinarily, courts do not grant orders which have not been prayed for by any of the parties. Quite apart from the absence of the prayer for condonation, in my view, the appellant's conduct in this regard is so egregious that it borders on misrepresentation. The non-compliance does not endear itself to condonation.

Failure to address the appellant's prospects of success

[49] It is trite that a party applying for condonation for his or her non-compliance with the rules must give a full and frank explanation for his or her non-compliance. In addition such party must demonstrate that the appeal enjoys good prospects of success. There is thus a strong interplay between the two requirements. As pointed out earlier in this judgment, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide the condonation application without regard to the prospects of success on appeal.

[50] In the present matter, the appellant failed altogether to address the question whether his appeal enjoys good prospects of success. Such failure is fatal to the appellant's application for condonation. In any event even if the appellant had tried to address the issue of prospects of success, I am of the view that the cumulative effect of the appellant's multiple non-compliances with rules are so glaring, flagrant and inexplicable that this court would have refused the application without considering the prospects of success.

Conclusion

[51] In the light of the foregoing considerations, findings and conclusion, I am of the considered view that the appellant's application for condonation and reinstatement is liable to be refused and struck from the roll with costs.

Costs

[52] The normal rule is that costs follow the result. I cannot see any reason why that rule should not apply to the present appeal. The respondents have been successful in their opposition to the application. They are entitled to be indemnified for their costs.

[53] The first to seventh respondents prayed for an ordinary cost order, in other words costs on a party and party scale. The DHC respondents, however, pray for a punitive order of costs on the scale as between attorney and own client. I am of the view that there is a justifiable basis for treating the two sets of respondents differently with regard to the scale of costs to be applied. It is trite that a court should not grant an order which had not been prayed for by a party. The first to seventh respondents did not pray for a punitive order of costs. It is for that reason that they cannot be granted a punitive order of costs.

[54] Furthermore the first to seventh respondents, prior to the hearing, had negotiated with the appellant and had agreed on the amount of security for costs they required which was calculated on the ordinary scale. Based on that agreement

the appellant furnished the first to seventh respondents with an irrevocable bond of security for their costs.

[55] As regards the DHC respondents' prayer for a punitive order of costs, I am of the considered view such order is justified in the circumstance of this appeal. They were ignored and treated with disdain by the appellant when it came to the security for their costs: they were treated as if they were not party to the appeal proceedings. To their prejudice, they were not approached by the appellant to negotiate an agreement for the amount of security to be furnished by the appellant. In my view the DHC respondents are free to pray for an order of costs calculated on a different scale than the costs scale agreed between the appellant and the other respondents.

[56] A further weighty consideration is the fact that as the result of the appellant's failure to furnish the DHC with security for costs, those respondents are now exposed to the risk of not being able to enforce their order of costs due to the fact that the appellant has been absent from Namibia for more than two years and thus out of reach of the coercive machinery of this court such as execution against his properties. According to the papers before court he stated that he has sold his house in Windhoek. In the circumstances, the costs order may turn out to be a hollow one, for not being able to be enforced. This clearly demonstrates the extent of potential prejudice caused by the appellant's conduct towards DHC respondents. In my view such conduct justifies censure from this court.

[57] I am of the view that, given the appellant's multiple non-compliance with the rules compounded by his lack of forthrightness and *bona fide* in his attempt to explain his non-compliance with the rules, a punitive order of cost is justified.

[58] The conduct entailed *inter alia* the fact that the appellant failed to include relevant documents and exhibits in the record which were pertinent to the issues which fell for determination in the appeal such as the order of the court *a quo* order of 28 July 2020 relevant to the determination of the issue of fugitive from justice. It became incumbent upon the DHC respondents to compile a separate bundle of relevant documents and exhibits and placed it before court which dispelled the misstatements of fact made by the appellant.

[59] The further conduct which calls for censure from this court in the form of a punitive cost order is the fact that the appellant recklessly forged ahead with the application for condonation knowing or while he ought reasonably to have known – given the fact that he is a senior legal practitioner of this court represented by a senior instructing legal practitioner - that the application was fatally defective in that it failed to deal with the important requirement namely whether the appeal enjoyed prospects of success. That was elementary. In my view nothing prevented the appellant from withdrawing the appeal and launching a fresh one with a compliant application for condonation.

[60] In my judgment the appellant's conduct calls for a measure of censure from this court in the form of a punitive order of costs as a sign of disapproval of his conduct. In the exercise of my discretion, I have decided not, to grant an order of

costs on a scale as between attorney and own client prayed for by DHC respondents for the reason that, I am of the view that, an order of costs on an attorney and client scale would be appropriate in the circumstances and would vindicate the DHC respondents' rights.

The order

[61] In the result, I make the following order:

1. The application for condonation and reinstatement is refused and is struck from the roll.
2. The appellant is to pay the first to seventh respondents' costs calculated on a party-party scale such costs to include the costs of one instructing and two instructed legal practitioners.
3. The appellant is further to pay the costs of the eleventh to thirteenth respondents calculated on attorney and client scale, such costs to include the costs of one instructing and one instructed legal practitioner.

ANGULA AJA

DAMASEB DCJ

MAINGA JA**APPEARANCES**

APPELLANT:	R Lewies Instructed by Erasmus & Associates
1 st to 7 th RESPONDENTS:	A W Corbett (with him H Garbes-Kirsten) Instructed by Koep & Partners
9 th and 10 th RESPONENTS:	No appearance
11 th to 13 th RESPONDENTS:	T A Barnard Instructed by Theunissen, Louw & Partners
14 th RESPONDENT:	No appearance