CASE NO: SA 94/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CAPX FINANCE (PTY) LTD **Appellant**

and

ONAMAGONGWA TRADING ENTERPRISES CC **Respondent**

Coram: SHIVUTE CJ, MAINGA JA and ANGULA AJA

Heard: **25 March 2024**

Delivered: **21 June 2024**

Summary: This is an appeal against the order and judgment of the High Court dismissing the appellant's claim against the respondent for the payment of a sum of N$876 300. The claim was based on a cession of a debt by a cedent (Ratu) to the cessionary (the appellant).

By way of brief background: the respondent was awarded a contract by the Roads Authority for the construction of the road between the city of Windhoek and Hosea Kutako International Airport. In order to execute the contract, the respondent entered into a lease agreement with Ratu for the lease of earthmoving equipment. Ratu then entered into an invoice discounting agreement with the appellant in terms whereof it ceded to the appellant the total amount of its invoices owed by the respondent to it. A

written undertaking was then forwarded via email by a representative of the appellant (Ms Walker) to a representative of the respondent (Mr Ipinge) for signature by him, in terms of which the respondent would undertake to pay the amount it owed to Ratu to the appellant instead. The written undertaking was then purportedly signed by Mr Ipinge (which is denied by him) and returned to Ms Walker.

On account of the purportedly signed written undertaking, the appellant paid to Ratu a sum of N$521 360 in terms of the invoice discounting agreement. The respondent thereafter disputed that it owed Ratu N$876 300 at the time the invoice discounting agreement was concluded. According to respondent, it owed a lesser amount, about N$130 000. As a result of this dispute, the appellant instituted an action against the respondent claiming N$876 300 and contending that the respondent was estopped from denying its indebtedness to the appellant as it negligently represented to the appellant that it owed N$876 300.

The court *a quo* found that the appellant failed to prove its claim on a balance of probabilities and dismissed the appellant's claim with costs.

On appeal, the appellant failed to comply with a number of rules of court. Firstly, the appellant failed to comply with the provisions of rule 11(10) in that the parties only met three months after the noting of the appeal to discuss the appeal record. Secondly, the appellant failed to enter into good security for the respondent's costs. Thirdly, the record was filed late.

The appellant filed an unopposed condonation application. The appellant's legal practitioner explained that she could not get hold of Mr Ipinge for purposes of discussing the appeal record as well as for obtaining a waiver for security for costs.

Held that, the explanation tendered by the legal practitioner on behalf of the appellant for the non-compliances cannot be said to be reasonable. Instead, the explanation reveals a clear lack of diligence on the part of the legal practitioner for the appellant. The explanation is weak, not reasonable, unsatisfactory and is therefore not acceptable.

Held that, in order for the appellant to succeed with its plea of estoppel it must satisfy the following requirements: firstly, a representation by word or conduct intentionally or negligently made by the respondent; secondly, reliance by the appellant's representative on the representation so made; thirdly, the reasonableness of the reliance by the appellant's representative on the representation made by the respondent; fourthly, the prejudice caused to the appellant consequent upon reliance on such representation; and fifthly, whether Mr Ipinge acted negligently which negligence caused prejudice to the appellant.

Held that, in our law, estoppel is a matter of evidence not substantive law.

Held that, the court *a quo* was correct in its reasoning that the existence of the debt of N$876 300, as a fact, was not put to Mr Ipinge. In terms of our law, the representation 'must relate to an existing fact'. In this matter, no mention was made of the existing fact, which was the amount owed. The principles of equity and fairness to both parties militate against a finding that Mr Ipinge should be held to have represented that he owed the appellant an indeterminable amount of money given the fact that the amount of N$876 300 was not mentioned as an existing fact during the telephone conversation.

Held that; in terms of our law, a person is taken to know that a representation is false if he or she consciously abstains from doing something which in the ordinary course of business such person would have done because he or she is afraid of finding out the truth. The evidence demonstrates that Ms Walker was either gullible or was afraid of finding out the truth. Accordingly, her conduct cannot be said to have been reasonable in acting on the representation.

Held that; there is no evidence on record which shows that Mr Ipinge knew or ought reasonably to have known what an 'invoicing discount agreement' entailed namely that the appellant would pay N$521 360 to Ratu in exchange of the debt of N$876 300, as a result of his representation.

Held that, taking everything into consideration, the court *a quo* was correct when it held that Mr Ipinge could not be held accountable for Ms Walker's reliance on 'the impression' in her mind that he had represented that he had signed the undertaking for the amount claimed.

In the result, condonation is refused and the appeal is struck from the roll with costs.

APPEAL JUDGMENT

ANGULA AJA (SHIVUTE CJ and MAINGA JA concurring):

Introduction

[1] This is an appeal against the judgment and order of the court *a quo* dismissing the appellant's claim against the respondent for payment of the sum of N$876 300. The origin of the claim was based on a cession of a debt by a cedent to the appellant, as a cessionary. The respondent did not deny that the cession took place, it however pleaded that at the time the cession took place, it owed the cedent a much lesser amount than the amount claimed from it by the appellant, as a cessionary.

[2] The appellant on its part pleaded that the respondent's representative through his negligent conduct represented to the appellant during a telephone conversation that he had signed an undertaking in which he had admitted that the respondent owed the appellant the amount of money stated in the undertaking. Therefore, so the plea went, the respondent was estopped from disputing its indebtedness to the appellant.

[3] The court *a quo* dismissed the appellant's plea of estoppel holding that although the respondent's representative had represented that he had signed the

undertaking, which he in fact did not sign, the appellant had failed to prove that the representative had represented that the respondent owed the money stated in the undertaking. Accordingly, the appellant had failed to prove its plea of estoppel against the respondent.

[4] Not satisfied with the decision of the court *a quo*, the appellant now appeals to this Court contending that the court *a quo* erred in not upholding its plea of estoppel.

<u>The parties</u>

[5] The appellant is a South African company, trading in the business of discounting invoices, which entails the purchasing of invoices which are due for payment from entities' debtors at an agreed reduced fee. In the instant matter, it obtained cession of invoices from an entity called Ratu Trading CC (Ratu) which invoices were allegedly due for payment by the respondent to Ratu. The respondent is a close corporation registered in terms of the company laws of Namibia. Its sole member is one Mr Martyn Ipinge (Mr Ipinge). In this judgment, reference to the respondent will include Mr Ipinge and *vice versa*.

<u>Factual background</u>

[6] Most of the facts are common cause and can be briefly summarised as follows. During 2015 the respondent was awarded a contract by the Roads Authority, an entity in Namibia responsible for the construction and maintenance of national roads, for the construction of a road between the city of Windhoek and Hosea Kutako International Airport. In order to execute the contract so awarded, it entered into a lease agreement with Ratu in terms whereof it leased certain earthmoving equipment from Ratu. When

the lease agreement was concluded, the respondent was represented by Mr Iipinge, while Ratu was represented by a certain Ms Inge Zaamwani (Ms Zaamwani). This Ms Zaamwani is not the same person as the well-known public figure going by the exact same name.

[7] While the respondent was busy executing the contract using the rented equipment from Ratu, the latter entered into an invoice discounting agreement with the appellant in terms whereof Ratu ceded to the appellant the total amount of its invoices owed to it by the respondent. In order to implement the cession agreement, the appellant forwarded a written undertaking to the respondent for signature in terms of which the respondent would undertake that instead of paying the amount it owed to Ratu it would henceforth pay such amount to the appellant.

[8] On 8 November 2016 a director of the appellant, one Ms Walker purportedly emailed the written undertaking to Mr Ipinge for signature. She used an email address which she Googled from the internet. It turned out that the address so obtained was wrong. Thereafter she received an undertaking purportedly signed by Mr Ipinge on behalf of the respondent. She then telephoned Mr Ipinge in order to confirm whether it was indeed him who signed the undertaking. According to her, Mr Ipinge confirmed to her during the said telephone conversation that he had signed the undertaking. Mr Ipinge disputed that he had signed the undertaking, but did not deny that he had confirmed by telephone that he had signed it.

[9] On the basis of the purported signed undertaking by Mr Ipinge, the appellant paid to Ratu a sum of N$521 360 in terms of the invoice discounting agreement.

Thereafter the respondent disputed that the money it owed to Ratu at the time the invoice discounting agreement was concluded, was the sum of N$876 300 but was a lesser amount, about N$130 000. Accordingly, the appellant issued summons against the respondent claiming payment of the sum of N$876 300 contending that the respondent was estopped from denying its indebtedness to the appellant because it negligently represented to the appellant that it owed the said sum.

Proceedings before the court *a quo*

Pleadings

[10] In its particulars of claim the appellant alleged that on 8 November 2016 the respondent, then represented by Mr Ipinge 'completed an Irrevocable Payment Undertaking' in terms whereof the respondent confirmed and undertook that it was liable for payment of an invoice issued by Ratu in the amount of N$876 300 which amount was due and payable by 24 January 2017.

[11] The appellant further alleged that on 9 November 2016, during a telephone conversation between Ms Walker and Mr Ipinge, the latter confirmed that he had signed the undertaking document; that the relevant invoices were valid; that the respondent would make payment on 24 January 2017; and that payment would be made directly to the appellant. A copy of the transcribed telephone conversation was attached to the particulars of claim. The appellant therefore pleaded that the respondent was bound by its representation that it would pay the appellant the sum of N$876 300.

[12] The respondent filed a notice to defend whereupon the appellant filed an application for summary judgment alleging that the respondent did not have a *bona fide* defence and that appearance to defend was entered simply to delay the eventual granting of the judgment against the respondent.

[13] The respondent opposed the application for summary judgment. In its opposition to the application, Mr Ipinge who deposed to the opposing affidavit, denied that he was a party to the purported undertaking and that he had signed such undertaking. He further stated that the signatures appearing on the purported undertaking were not his and were not known to him, neither were such signatures authorised by the respondent. According to him, the invoices attached to the undertaking were prepared by Ratu with the intention to defraud the appellant as the previous invoices between the respondent and Ratu never exceeded the sum of N$100 000 whereas the invoice attached to the undertaking exceeded N$100 000. This was because the respondent rented smaller machinery from Ratu such as a compactor and a roller.

[14] The deponent went on to say that it was 'improbable that Ratu could have issued job cards in the amount of N$448 500 during October 2016 and N$427 800 during November 2016. The deponent further explained that the two payments made by the respondent in the sum of N$56 334,70 on 3 July 2017 and N$40 000 on 10 October 2017 were made on the understanding that at the time of the cession of the debt to the appellant, the respondent was indebted to Ratu in those respective amounts.

[15] After the respondent filed its opposing affidavit to the summary judgment, the appellant filed a status report stating that the respondent be allowed to defend the main claim, thereby abandoning the application for summary judgment.

[16] Thereafter, the respondent filed what it called 'a special plea' together with a plea on the merits. The special plea alleged that appellant's claim was based on forged documents. It insinuated that the fraud was perpetrated by Ratu. On the merits the respondent denied its indebtedness to the appellant and pleaded that the appellant's claim was based on forged documents. The respondent further denied that Mr Ipinge had signed the alleged undertaking.

[17] After the pleadings had closed and a pre-trial order had been issued, the appellant brought an application to re-open the pleadings and to be allowed to file a replication. The application was granted by the court whereupon the appellant filed its replication.

[18] The replication raised a defence of estoppel whereby the appellant pleaded that in the event that it were to be found that the written undertaking was not signed by a person authorised by the respondent, then in that event, the respondent was estopped from denying that the person who signed it was authorised.

[19] The appellant further pleaded that: first, on 8 November 2016, Mr Ipinge sent an email with an annexed signed undertaking to Ms Walker. Alternatively the respondent negligently allowed the said email to be sent from its email account; and

second on 9 November 2016, Mr Ipinge telephonically confirmed to Ms Walker that the written undertaking was signed by him on behalf of the respondent.

Evidence by the parties

[20] Ms Walker was the only witness who testified on behalf of the appellant. She testified that she was a Namibian citizen, employed by the appellant as its director and was residing in Cape Town, South Africa. She testified that the appellant purchased invoices which were due for payment from clients at an agreed fee.

[21] It was her testimony that in the present matter the appellant was approached by Ratu during November 2016 for invoice discounting services. The invoices were due for payment by the respondent on 24 January 2017. She then drafted an irrevocable undertaking for signature by the respondent. The undertaking was forwarded to the respondent on 8 November 2016 to an email address onamagongwatrading@gmail.com which she Google searched 'in order to avoid any risk of fraud'. She thereafter received a signed undertaking from the said email address on the same day. The email was terse and simply stated: 'As attached below for Ratu Trading invoices, regards'.

[22] She testified that it appeared on the undertaking that the respondent confirmed that it was liable to Ratu for payment of six invoices totaling N$867 300 and that payment was due on 24 January 2017. The undertaking appeared to have been

signed by Mr Ipinge. She then sent an email to the respondent’s email address and thanked him for the signed undertaking.

[23] Ms Walker testified further that on 9 November 2016, she contacted the respondent’s business telephone number and asked to speak to Mr Ipinge. She was informed that he was not available and was provided with his cellphone number. She thereafter phoned Mr Ipinge and spoke to him. According to her, he confirmed that he had signed the undertaking and further confirmed that the invoices were due for payment on 24 January 2017. He asked her for their bank details whereupon she pointed out to him that they were on the undertaking which he had signed. She testified that during the telephone conversation she was confident that he knew what document she was talking about; and that he was confirming that he had signed the undertaking. The telephone conversation was recorded and the transcription was handed into evidence as an exhibit.

[24] According to Ms Walker, on 23 January 2017 she received an email from Mr Ipinge requesting a grace period of ten days to pay the amount owed. She granted the extension but did not thereafter receive payment. Thereafter on 1 March 2017 she received a telephone call from Mr Ipinge during which he informed her that according to him the respondent only owed the appellant N$136 000. On 3 July 2017, the respondent paid an amount of N$56 343,70 to the appellant.

[25] Ms Walker testified further that on 2 August 2017 she met with Mr Ipinge who told her that he did not remember the telephone conversation of 9 November 2016

and he also did not sign the undertaking. Thereafter on 10 October 2017 the respondent paid an amount of N$40 000.

[26] Mr Ipinge was also the only witness who testified on behalf of the respondent. He testified that the respondent was awarded a contract by the Roads Authority to construct a road between Hosea Kutako International Airport and the city of Windhoek. It then entered into a lease agreement with Ratu for the lease of earthmoving equipment. They used the equipment for about three months and paid an invoice of N$56 000. He confirmed receiving a telephone call from Ms Walker advising him to henceforth pay the amount which the respondent owed to Ratu, to the appellant. According to him the amount then owed was about N$130 000 which it eventually paid to the appellant.

[27] He testified that the first time he heard about owing the appellant the sum of N$876 300 was when he received a telephone call from the appellant's lawyer. Furthermore, the first time he saw the undertaking was after the respondent was served with the summons to which the undertaking was attached.

Findings by the court a quo

[28] The court *a quo* found that there was no evidence that the signature on the undertaking document was that of Mr Ipinge or of someone he had authorised, given the fact that he was the sole member of the respondent. It further found the evidence by Mr Ipinge that the email address onamagongwatrading@gmail.com to which the undertaking document was sent was not the respondent's email address to be plausible.

[29] The court further held that the transcript of the telephone conversation on 9 November 2016 between Mr Ipinge and Ms Walker was not disputed. The question was however whether it constituted proof that the parties 'entered into the disputed agreement'. The court further found that the conversation did not clearly indicate which invoices were referred to and the exact amount payable. The court therefore concluded that 'the conversation, in the light of those omissions, cannot be proof that the defendant had signed the specific undertaking, particularly in view of the failure by the plaintiff to prove that it was indeed Martyn Ipinge who signed the undertaking or for that matter by any person who was authorised to sign on behalf of the defendant'.

[30] The court further found that there was no evidence that Ms Zamwaani of Ratu had forged Mr Ipinge's signature or that she issued job cards for payment of N$448 500 during October 2016 and N$427 800 during November 2016.

[31] The court then proceeded to consider the appellant's plea of estoppel and rejected it. It reasoned that the undertaking was about money which was crucial to the agreement. However, the amount of money was not mentioned during the telephone conversation between Ms Walker and Mr Ipinge. It was found that 'it was evident' that Mr Ipinge was aware of the arrangement by Ms Zamwaani with Capx concerning the invoices which were payable by the respondent to Ratu. The court further found that Mr Ipinge had confirmed and understood that he had to make payments directly to Capx. The court accordingly concluded that Mr Ipinge had represented that he had signed an undertaking of 'some invoices' which were due for payment on 24 January 2017. The court was however of the view that such representation fell short of proving

that Mr Ipinge had represented that he signed an undertaking of invoices in the amount of N$876 300.

[32] The court accordingly found that the appellant had failed to prove its claim on a balance of probabilities and dismissed the appellant's claim with costs.

Grounds of appeal

[33] One of the grounds of appeal is that the court *a quo* erred in dismissing the appellant's reliance on estoppel to preclude Mr Ipinge from denying that he had signed the written undertaking. Criticism was levelled at the court *a quo* for holding that even if it can be said that the respondent through Mr Ipinge held out that he had signed an undertaking of 'some invoices' which were due for payment on 24 January [2017], that representation fell short of holding out that had he signed an undertaking of invoices in the amount of N$876 300. It was contended that such holding was made in the circumstances where there was no evidence of any other signed written undertaking. It was asserted that the court *a quo* erred in finding that Mr Ipinge during the telephone conversation with Ms Walker, could have referred to another written undertaking other than the undertaking relied on by the appellant.

Proceedings before this Court

[34] The appellant was represented by Mr Heathcote assisted by Mr Jacobs whereas Mr Kamuhanga, on his maiden appearance before this Court, appeared for the respondent. Both counsel filed comprehensive sets of heads of argument, which

were amplified during oral arguments and for which the court is grateful for the assistance rendered.

Application for condonation and re-instatement

[35] The appeal is riddled with non-compliances with the rules of this Court which required the appellant to apply for condonation for its non-compliance with those rules and resultantly, the re-instatement of the appeal. It is to that application I now turn.

[36] The application is not opposed but that does not mean it stands to be granted. The appellant bears the onus to prove on a balance of probabilities that its explanation for the delay and non-compliance with the rules of this Court is reasonable and acceptable and further that there are reasonable prospects of success of the appeal.

[37] This Court has held that there is some interplay between the obligation of an appellant to provide a reasonable and acceptable explanation for his or her non-compliance with the rules of this Court and the reasonable prospects of success. In cases where there had been flagrant non-compliance with the rules which demonstrate a 'glaring inexplicable disregard' for the process of the court the court may dismiss the application for condonation without considering the prospects of success.

Instances of non-compliance

[38] The appellant failed to comply with the provisions of rule 11(10) of this Court which provides that, within 20 days of filing the notice of appeal, the parties must

meet to discuss and eliminate irrelevant documents from forming part of the record of the appeal and thereafter file a report. In the present matter the notice of appeal was filed on 2 November 2021. The required meeting was held late on 7 March 2022 about three months after the notice of appeal had been filed. The report was as a result also filed late on 8 March 2022.

[39] The appellant further failed to comply with the provisions of rule 8(2) which requires the appellant to file copies of the record within three months of the date after delivery of the judgment appealed against. The three month period expired on 3 January 2022. As a result, in terms of the rule, the appeal was deemed to have been withdrawn. It was for that reason that on 10 March 2022, the appellant's legal practitioner received a letter from the registrar of this Court advising that the appeal was deemed to have been withdrawn. The record was only filed on 19 April 2022 long after the prescribed time had expired, hence the application for condonation and re-instatement.

[40] In addition, the appellant had failed to comply with rule 14(2) of this court which requires an appellant to enter into good security for the respondent's costs within 15 days after filing the notice of appeal. The notice of appeal was filed on 2 November 2021, however the proof of waiver of security by the respondent was only filed on 8 March 2022 which was way out of the time prescribed by the said rule.

The appellant's explanation for non- compliance

[41] The founding affidavit in support of the application for condonation and re-instatement has been deposed to by the legal practitioner for the appellant.

[42] As regards the failure by the appellant to comply with rule 11(10) which requires the parties to meet within 20 days of filing the notice of appeal with the purpose of eliminating unnecessary documents from the record, the deponent's explanation is that after the appeal was noted the respondent became unrepresented. The respondent's notice to oppose the appeal was served at the offices of the appellant's legal practitioner by the Deputy Sheriff. The deponent went on to say that despite her best efforts, she was unable to contact Mr Ipinge. It was for that reason that the meeting could not be held and consequently, the report contemplated by rule 11(10) could not be filed.

[43] In my view the explanation in this regard is not acceptable. I say this for the following reason. It is common cause that Mr Ipinge is a lay person. As a result, he could reasonably not be of any assistance to the process of eliminating irrelevant documents from the record. Had the legal practitioner for the appellant been diligent she would have attended to that task on her own without Mr Ipinge's involvement. There was nothing preventing her from attending to that task alone and file a report explaining to the court the reason why the report was unilateral. Any reasonable court would have accepted such explanation and the report. In this connection one is tempted to ask a rhetorical question: What would have happened to the appeal if Mr Ipinge could not be found for an indeterminable period? Would that have been the end of the appeal? I think not.

[44] The same explanation is tendered by the deponent with regard to the appellant's failure to enter into good security for the respondent's costs, within the

time period prescribed by the rules. The excuse tendered is that she could not get hold of Mr Ipinge to ascertain whether the respondent was prepared to waive the appellant from furnishing security. In my view the explanation does not live up to scrutiny; it shows that the deponent had not acted with diligence.

[45] I do not understand the rule to imply that waiver of security by the respondent is a *sine qua non* to the payment of security by an appellant. In other words, the appellant is not prohibited from paying an amount of reasonable security in court without first obtaining a waiver from the respondent. In my view, in the circumstances such as the appellant's legal practitioner found herself in, an appellant can pay security without necessarily first asking the respondent for waiver as long as the amount tendered is reasonably sufficient. Therefore, there was nothing that prevented the legal practitioner from approaching the Registrar of the High Court to determine the amount which could constitute sufficient security.

[46] No explanation was given why the appellant, as a financier in the business of discounting invoices and thus financially able, did not simply put up security which it considered reasonably sufficient. Should the respondent appear and object to the amount, the appellant would have certainly been in a position to top-up the amount of security to the level demanded by the respondent or determined by the registrar.

[47] In any event, in terms of rule 14(2)(b) the appellant has the right to apply to the court appealed from to be released wholly or partially from the obligation to furnish security. This option was not exercised.

[48] The deponent appeared to have tried to take solace from the delay caused by the transcribers to finalise the record. I accept that part of the delay by the transcribers could not be ascribed to the conduct of the deponent because such delay was outside her control. However, the deponent cannot escape her share of delay that she caused by giving late instructions to the transcribers which delay was occasioned by her making a wrong assumption as to when the record should be filed, which was in turn caused by her failure to read the rules.

[49] In this regard, the deponent’s explanation for her neglect to timeously instruct the transcribers to prepare the record is that she was under the wrong impression that the record was only due for filing within three months after the filing of the notice of appeal. She went on to explain that: ‘Because of my wrong impression, I did not read and consider rule 8(2)(b) at all. Had I done so I would have realised that I was under the wrong impression’. According to her calculation her ‘misunderstanding’ contributed 12 court days to the delay.

[50] I must say that the deponent’s brutal honesty is commendable but in my view it does not absolve her from her gross neglect to read the relevant rule. I find it rather astonishing for the deponent to have blindly embarked on dealing with the appeal without first reading the applicable rules. It is clear that she acted negligently and should have reasonably foreseen that she would make mistakes in the handling of the appeal.

[51] In this regard, this court in *Channel Life Namibia (Pty) Ltd v Otto*[1] had the following to say with regard to the legal practitioners' non-compliance with the rules of this Court.

> '[47] [A]t each session of the Supreme Court there are various applications for condonation because of non-compliance with some or other of the rules of the court. Many of these applications could have been avoided through the application of diligence and by giving the process a little more attention. Practitioners should inform themselves of the provisions of the Rules of the Supreme Court and cannot accept that those rules are the same as that of the High Court.'

[52] Furthermore in *Shilongo v Church Council of the Evangelical Church in the Republic of Namibia*[2] this Court stressed the necessity and importance of the legal practitioners familiarising themselves with the rules of this Court before embarking on handling an appeal to this Court. The court stated as follows:

> 'It is therefore of cardinal importance that practitioners who intend to practice at the Supreme Court and who are not familiar with its rules take time to study the rules and apply them correctly to turn the tide of applications for condonation that is seriously hampering the court's ability to deal with the merits of appeals brought to it with attendant expedition.'

[53] For all those reasons and considerations set out above, I have arrived at the conclusion that the explanation tendered by the legal practitioner on behalf of the appellant for the delay cannot be said to be reasonable. Instead the explanation reveals a clear lack of diligence on the part of the legal practitioner for the appellant.

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[1] *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) para 47.
[2] *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) at 169 para 6.

The explanation for the delay and non-compliance with rules is weak, not reasonable, unsatisfactory, and is therefore not acceptable.

[54] I turn to consider whether there are reasonable prospects of success of the appeal.

Whether there are prospects of success

Submissions on behalf of the appellant

[55] Mr Heathcote correctly submitted that the requirement that the representation must be precise and unambiguous was rejected by this Court in *Eysselinck v Standard Bank, Namibia Ltd (Stannic Division) & others*[3]. Counsel pointed out in this regard, in his written submissions, that what the law requires is 'reasonableness' and not 'exactitude'. Counsel therefore submitted that the court *a quo* erred in raising the bar for the test from 'reasonableness' to that of 'exactitude' which is the test that was laid down by this court in *Eysselinck.*

[56] Mr Heathcote accordingly submitted that on the evidence before the court a quo*,* it erred in not upholding the appellant's plea of estoppel. In this regard, counsel pointed out that the court *a quo* found that the representation by Mr Ipinge should have been more precise and unambiguous, despite the evidence by Ms Walker that she reasonably understood Mr Ipinge's representation during the telephone conversation to be that he had signed the written undertaking when he had in fact not signed any written undertaking.

[3] *Eysselinck v Standard Bank Namibia Ltd (Stannic Division) & Others* 2004 NR 264 (SC) at 252E-253B.

Submissions on behalf of the respondent

[57] Mr Kamuhanga, pointed out that the appellant's plea is based on estoppel by negligence, however estoppel by negligence presupposes the existence of a legal duty of care between the representor and representee which legal duty was neither pleaded nor proven in the present matter. Therefore, so the argument went, the defence of estoppel was correctly rejected by the court *a quo.*

[58] Mr Kamuhanga further argued that the facts of the present case are distinguishable from the facts in *Eysselinck* on which 'the appellant is squarely basing its appeal'. To buttress his argument, counsel referred to a passage in the *Eysselinck* judgment where the court held that after the plaintiff (Standard Bank) had received reliable information that Pretorius was a notorious fraudster who was in a habit of selling vehicles to members of the public whilst such vehicles were still encumbered and Pretorius pocketed the proceeds of the sale 'there then arose a duty of care towards members of the public who were potential buyers and thus innocent third parties and an urgent need to take reasonable steps to prevent prejudice to innocent third parties'. Counsel therefore submitted that in the present matter, no duty of care existed on the respondent towards the appellant.

[59] I interpose here to say, that I agree with the submission that the facts in *Eysselinck* are distinguishable from the facts of the present matter, in that, in that matter, the court was dealing with estoppel regarding cession of ownership of a movable property, a vehicle, which involved a legal requirement that the property must have been delivered to found the defence of estoppel. The present matter concerns a cession of a debt which does not require delivery. The representation

alleged in the present matter is alleged to be by negligent conduct. Furthermore, although the court in *Eysselinck* dealt with the principles applicable to estoppel, it had found that '*culpa* has not been proved'.[4] Instead the court found that Standard Bank was the proximate and/or decisive cause of Eysselinck's prejudice because, were it not for its actions or omissions Eysselinck would not have suffered the prejudice it did.

<u>The law</u>

[60] What entails a plea of estoppel, was succinctly stated by Corbett JA in *Aris Enterprises (Finance) (Pty) Ltd) v Protea Assurance Co Ltd*[5] as follows:

> 'The essence of the doctrine of estoppel by representation is that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, i.e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly (*ibid para 371*); and in general it must relate to an existing fact.'

[61] The law relating to estoppel is further set out by the learned authors Rabie and Sonnekus in their work *The Law of Estoppel in South Africa* 2 ed (2000) at 63, para 5.1 where the learned authors state:

> 'In general, the premise applicable in all circumstances is that the estoppel assertor can only successfully rely on estoppel if the reasonable person in the street, in the position of the estoppel assertor would also have been misled by the

[4] At 274H-I.

[5] *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance* Co Ltd 1981 (3) SA 291 (AD) at 274D-E.

> conduct on which the estoppel is founded. To determine whether the reasonable person would have been misled, it might be helpful to answer the applicable question in the negative: The reasonable person would not have been misled if it can be ascertained that the circumstances were such that they would have put the reasonable person on his guard and compelled him to ask more questions before accepting the allegations or representations of the representor at face value. If in reality the estoppel assertor had under the same circumstances neglected to ask for further explanation or had not been on his guard due to the fact that he tends to be more gullible than a reasonable person would have been, then the conduct of the representor is not to objectively be classified as unreasonable or wrongful, and the reliance on estoppel must fail. It has already been emphasised that the doctrine of estoppel cannot be misused to protect the naïve or gullible against his own stupidity. Even the man in the street must take cognisance of facts that may have a bearing on his legal position.
>
> Formulated otherwise, this qualification is also referred to when it is said that the reliance on representation must be reasonable.
>
> The person who bases an estoppel on a representation made to him, must establish that he reasonably understood the representation in the sense contended for by him. It follows that he has to prove that his reliance on the representation was reasonable. He will therefore have to show that he did not know that the representation was untrue or incorrect; that he did not have information which put him upon enquiry, or, if he did, that he exercised reasonable care and diligence to learn the truth; and, generally that he was not misled by a lack of reasonable care on his part.'

[62] In sum, the test for a representation is an objective one. It entails a comparison between on the one hand the conduct of the estoppel assertor who claims that he has been misled by the representation to his prejudice and on the other hand the conduct to be expected from the reasonable person in the same position.[6] The onus is on the person who asserts estoppel to prove the representation and the prejudice suffered.

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[6] *Ibid* at 53, para 4.1.

[63] It follows therefore that in order for the appellant to succeed with its plea of estoppel it must satisfy the following requirements: first a representation by word or conduct intentionally or negligently made by the respondent; second, reliance by Ms Walker on the representation made by the respondent; third, the reasonableness of Ms Walker in relying on the representation; fourth, the prejudice caused to the appellant consequent upon reliance of the representation; and fifth whether Mr Ipinge acted negligently which negligence caused prejudice to the appellant.[7]

[64] The court a *quo* had found that Mr Ipinge had made a representation to Ms Walker that he had signed an undertaking concerning certain invoices. It further found that the appellant had suffered prejudice relying on Mr Ipinge's such representation when Ms Walker paid an amount of N$521 360 to Ratu.

Issues for determination

[65] Only three issues call for determination in the present matter, the other two having been already determined by the court *a quo.* Those issues are: first whether the court *a quo* erred in finding that even though Mr Ipinge made a representation that he had signed an undertaking, he did not represent that 'he signed an undertaking of invoices in the amount of N$876 300'; second, whether Ms Walker acted reasonably on relying on Mr Ipinge's representation; and whether Mr Ipinge acted negligently in not averting the prejudice in the circumstances in which a reasonable person in his position would have averted the prejudice.

[7] *NBS Bank Ltd v Cape Produce Company (Pty) Ltd & others* 2002 (1) SA 396 (SCA).

Discussion

[66] Cut to the chase, this appeal is directed at the court *a quo*'s finding as contained in para 36 of the judgment where it rejected the appellant's plea of estoppel. It is therefore convenient to reproduce the said paragraph in order to provide context to the discussion that follows. It reads:

> '[36] Ms Walker's response to the question whether the amount was mentioned indicated that she was confident that Mr Iipinge knew what she was talking about. It must however be pointed out that she was not entirely clear in seeking confirmation from Mr Ipinge. The telephone call was to determine whether Mr Ipinge indeed signed the undertaking. The undertaking involved a certain amount of money and this was a crucial element of the agreement. It is evident from the telephonic discussion that Mr Iipinge was aware of the arrangement by Ms Zamwaani with Capx concerning the invoices which were payable to her. He also confirmed that he understood he had to make payment directly to Capx. It can be said that the defendant held out that he had signed an undertaking of "some invoices" which are due on the 24th of January. This falls short of holding out that he signed an undertaking of invoices in the amount of N$876 300. The existence of this fact was not put to him to confirm and it cannot now be argued that he held out the existence of an undertaking involving invoices in this amount. Whilst Ms Walker had the impression that he knew what she was talking about, it cannot be said that he held out that payment in the sum of N$876 300 was due to Ratu Trading and that he would pay this amount to the plaintiff. The defendant therefore cannot be held accountable for the impression in the plaintiff's mind that he acceded to having signed the undertaking for the amount claimed.'

[67] Before embarking on considering the issues identified for determination, I deem it important to emphasis one key legal consideration stressed by Rabie and Sonnekus[8] with which I align myself. According to the learned authors, in every instance, the underlying principle remains that in the interest of equity and fairness to both parties, the court must ascertain whether the conduct complained of can be

[8] *The Law of Estoppel in South Africa*, page 75, para 5.3.3.3.

classified as legally relevant representation that would have misled a reasonable person in the same position. It is only after this has been determined that there could be scope for ascertaining whether the conduct of the estoppel denier was in fact blameworthy, ie whether he acted negligently in not averting the prejudice in the circumstances in which a reasonable person in his position would have done so.

Whether the court a quo erred in holding that Mr Ipinge did not represent to Ms Walker that he signed an undertaking of invoices in the amount of N$876 300

[68] Earlier in this judgment, I summarised Mr Heathcote's submission to the effect that the court *a quo* erred in holding that representation should have been more precise and unambiguous despite the fact that Ms Walker testified that she reasonably understood Mr Ipinge's representation to be that he had signed the written undertaking when he had in fact not done so (signed any written undertaking). Counsel argued that the court raised the bar for the test to found estoppel from 'reasonableness' to that of 'exactitude' which is not the test that was laid down by this Court in *Eysselinck*.

[69] In my view, the criticism directed at the court *a quo*'s finding in that regard is not justified and is not borne out by the wording in the paragraph of the court *a quo's* judgment. The court *a quo* did not say that the representation should have been precise or unambiguous in its assessment whether the appellant had proven that element on a balance of probabilities as required by law. It would appear to me that counsel overstated his case by attributing to the court *a quo* that it found that the representation should have been more 'precise and unambiguous'. Nowhere, *ex facie* para 36 do the words 'precise' or 'unambiguous' appear. The court *a quo* did also not

find that 'there was lack of specificity' as contended for by counsel in his heads of argument.

[70] In terms of our law, estoppel is a matter of evidence and not substantive law. That being the case, the enquiry whether Mr Ipinge represented that the respondent owed N$876 300 to the appellant, should be directed to the evidence adduced on behalf of the appellant to prove that element of the plea of estoppel.

[71] In the circumstances it become necessary to closely scrutinise the relevant passage of the transcript of the telephone conversation between Ms Walker and Mr Ipinge together with the evidence by Ms Walker upon which it is contended that Mr Ipinge represented that the respondent owed the appellant N$876 300. The passage of the transcript reads as follows:

> 'Anthea: Yes, so you have signed the undertaking that confirms those invoices and that confirms that they going (sic) to be paid on the 24 January. Is that correct.
>
> Martyn: Yes, Yes.
>
> Anthea: Alright. I also need to confirm with you that you understand that the payment needs to be made directly to Capx not Ratu Trading?
>
> Martyn: Oh, you mean whenever we are going to put the payment should not go directly to her should go to you?
>
> Anthea: It must come to us, you can't pay it to Ratu Trading, it must be paid to Capx Finance.'

[72] In the above dialogue, ‘Anthea’ and ‘Martyn’ are the first names of Ms Walker and Mr Ipinge respectively. What is clear from the above passage is that Ms Walker asked Mr Ipinge whether he had signed the ‘undertaking that confirms those invoices’ to which Mr Ipinge answered ‘Yes, yes’. Nothing can be clearer than an answer ‘Yes’. There is no ambiguity or impreciseness in that answer. It is a different inquiry altogether, as to what the answer meant to convey which is a matter of interpretation. It was incumbent on Ms Walker to confirm, which invoices she was referring to and for what amount. Later in the judgment, I deal with Mr Ipinge’s knowledge at the time of the telephone conversation as well as his understanding.

[73] When Ms Walker testified about the representation, she stated that Mr Ipinge ‘confirmed per telephone conversation that he had signed the undertaking that was emailed to him and he confirmed that the invoices are due for payment on 24 January 2017’. She again did not mention which invoices and for what amount the representation confirmed.

[74] During cross-examination Ms Walker was asked whether at any stage during the telephone conversation she had spoken ‘about the amount that Ratu Trading holds or was given by the plaintiff. She responded: ‘During the conversation I was confident that he knew which document I was speaking about’. It is clear that the only ‘document’ she was talking about was the undertaking. At no stage during the telephone conversation was the amount which was due for payment mentioned.

[75] Mr Kamuhanga correctly pointed out that during the cross-examination Mr Ipinge was not asked as to what undertaking he said he had signed nor was he asked

to state the reason why he said he had signed the undertaking whereas he had not done so. He was not confronted with Ms Walker's version so as to afford him an opportunity to explain his understanding about what Ms Walker was talking about during the telephone conversation. It was not put to Mr Ipinge that Ms Walker reasonably understood his representation to mean that he was talking about the invoices for the sum of N$876 300. In other words, the principles regarding the approach to cross-examination, laid down in the oft-quoted case of *Small v Smith*[9] and referred to with approval by this Court in *Namdeb Diamond Corporation (Pty) Ltd v Gaseb*[10] were not observed.

[76] Mr Ipinge's evidence on the disputed amount of N$876 300 during the telephone call was that he was advised to henceforth pay the amount which the respondent owed to Ratu, to the appellant. According to him the amount then owed was about N$130 000. It was never put to him during the cross-examination that the amount owed was N$876 300. On the principle laid down in *Small v Smith*, it is 'grossly unfair and improper' to let Mr Ipinge's evidence go unchallenged in cross-examination on the disputed amount of N$876 300 and afterwards to argue that he must be held to have made the representation that he had confirmed that the amount of N$876 300 was owed by the respondent to the appellant.

[77] In my view the court *a quo* was correct in its reasoning that the existence of the debt of N$876 300, as a fact, was not put to Mr Ipinge. In terms of the law, the representation 'must relate to an existing fact'.[11] In the present matter, no mention

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[9] *Small v Smith* 1954 (3) SA 434 (SWA) at 438E-G.
[10] *Namdeb Diamond Corporation (Pty) Ltd v Gaseb* 2019 (4) NR 1007 (SC) para 61.
[11] Joubert (ed) *The Law of South Africa* (2 ed) vol 9 para 657.

was made of the existing fact, which was the amount owed. Under those circumstances, how can it be fairly and reasonably contended that Mr Ipinge represented that he confirmed that the respondent owed the amount of N$876 300 if such amount was not mentioned as an existing fact.

[78] In my view, the ‘underlying principle of equity and fairness to both parties’, stressed by Rabie and Sonnekus *(supra)*, militates against a finding that Mr Ipinge should be held to have represented that he owed the appellant an indeterminable amount of money given the fact that the amount of N$876 300 was not mentioned as an existing fact during the telephone conversation

[79] A question then arises: Why would Mr Ipinge make a representation that he signed the undertaking about the invoices. From Mr Ipinge’s perspective and knowledge the respondent owed N$130 000 and did not know about the amount of N$876 300. It is common cause that after the said telephone conversation the respondent paid the sum of N$130 000 to the appellant.

[80] It follows therefore in my judgment that, the court a quo was correct in holding that it could not be argued that Mr Ipinge had held out the existence of an undertaking involving invoices for the amount of N$876 300. To my mind the court *a quo* was correct when it said ‘the existence of this fact [the debt of N$876 300] was not put to him to confirm . . . .’

[81] In the result, the evidence failed to prove that Mr Ipinge had represented to Ms Walker that he had signed an undertaking for payment of invoices in the sum of N$876 300.

[82] Another issue which is connected to the invoices upon which the sum of N$876 300 is predicated, was whether Ratu had issued job cards which made up that amount. In terms of the pre-trial order one of the issues the court *a quo* was asked to determine was whether 'Ratu Trading CC issued Job Cards for payment of N$448 500 during October 2016 and N$427 800 during November 2016'. Needless to say that the two amounts added together equal the disputed sum of N$876 300.

[83] The only person who could conceivably testify about the issuance of the invoices was Ms Zamwaani. She did not testify. The evidence was that despite all reasonable steps having been taken to serve her with a subpoena, Ms Zamwaani could not be traced. She appeared to have disappeared into thin air. Mr Ipinge stated under oath in his affidavit in opposition to the summary judgment application that it was 'improbable that Ratu could have issued job cards in the amount of N$448 500 during October 2016 and N$427 800 during November 2016'. When the invoices were shown to him when he testified in chief, he stated that such invoices were not known to him and that he did not know where they were generated from. Again, his evidence on this score was not contradicted during cross-examination.

[84] It would thus appear in this respect that the court *a quo* had accepted Mr Ipinge's evidence when it held, at para 31 of the judgment, that no evidence was adduced that Ms Zamwaani issued job cards for payment of N$448 500 during

October 2016 and N$427 800 during November 2016. This finding is not assailed by the appellant in this appeal given the fact that those two amounts make up the sum of N$876 300. In the circumstances one is bound to ask another rhetorical question: If the origin of the invoices which make up the sum of N$876 300 have not been proved, how can Mr Ipinge be held to have confirmed that the respondent owed the sum of N$876 300 to the plaintiff? The obvious answer is that he cannot be so held.

[85] The amount on N$876 300 was central to the whole plea of estoppel and required to be proved. The court *a quo* was correct in finding that Mr Ipinge represented that he had signed the undertaking but that did not mean that he also represented that the respondent owed the appellant the amount of N$876 300.

Whether Ms Walker acted reasonably in relying on the representation by Mr Ipinge

[86] As pointed out hereinbefore, one of the requirements which the plea of estoppel assertor must prove is his or her reasonableness in relying on the representation. In this regard, Ms Walker did not testify that she reasonably relied on Mr Ipinge's representation. Instead she testified that she was 'confident' that Mr Ipinge knew what undertaking she was talking about. As it turned out her confidence was misplaced - Mr Ipinge had not signed the undertaking neither had he had sight of it prior to the dispute coming to the fore.

[87] To inquire into Ms Walker's reasonableness on relying on the representation by Mr Ipinge it is necessary to have regard to the extent, if any, she had known Mr Ipinge. I have elsewhere in this judgment found that there was no evidence that Ms Walker knew Mr Ipinge prior to their conversation over the telephone. It would appear

from the evidence, that it was the first time that Ms Walker had any dealings with Mr Ipinge which only took place during a once-off telephone conversation. To my mind, her conduct in this regard calls the basis of her confidence into question.

[88] In my view, Ms Walker was too trusting if not gullible. This fact is a relevant consideration in assessing whether she acted reasonably. Ms Walker's reasonableness on relying on the representation must be assessed taking into consideration her entire conduct during the transaction.

[89] The starting point is when she received invoices from Ratu. In this regard, there is merit in Mr Kamuhanga's submission that Ms Walker acted unreasonably when she initially received the invoices from Ratu; all bearing the same number, undated and not addressed to anyone. Instead of becoming suspicious, she inexplicably simply and in effect advised Ms Zamwaani to perfect her fraud by telling her to amend the invoices to make them compliant with the appellant's requirements. Yet all these were red flags. In my judgment, a reasonable business person in the position of Ms Walker would have become suspicious and questioned the invoices and would probably not have proceeded with the transaction.

[90] Counsel is further correct in his submission that Ms Walker acted unreasonably after she received invoices from Ms Zamwaani with the respondent's correct email address being ote@iway.na. Instead of using that address to send the invoices to the respondent, she embarked on a Google search ostensibly 'in order to avoid fraud'. In my view the result of her action, as borne out by what happened after she emailed the undertaking and invoices to the email address she had Googled,

clearly demonstrates her unreasonable conduct. In this regard the court *a quo* had found that the email address she Googled was not the respondent's email address.

[91] What further calls Ms Walker's reasonableness into question, is the lightning speed at which the transaction was concluded and the money paid to Ratu. There was no *quid pro quo* for N$521 360 paid to Ratu other than a worthless purported undertaking and the vague confirmation of its signing made over the telephone by a person she did not know. Payment of N$876 300 was only due in January 2017. In the meantime she proceeded in carrying a great risk which ultimately materialised. It is hardly conceivable that an amount of N$521 360 was dispensed with such wanton carelessness.

[92] In terms of our law, a person is taken to know that a representation is false if he or she consciously abstains from doing something which in the ordinary course of business such person would have done because he or she is afraid of finding out the truth.[12]

[93] The instances referred to above, in my view clearly demonstrate that Ms Walker was either gullible or was afraid of finding out the truth. Accordingly, her conduct cannot be said to have been reasonable in blindly acting on the representation.

[12] Rabie and Sonnekus, page 62, para 4.4.3.2.

Whether the appellant had proven that Mr Ipinge acted negligently in the circumstances in which a reasonable person in his position would have acted differently

[94] In this regard it is instructive to approach this question keeping in mind as to what was said by the court in *Monzali v Smith.*[13] The court stated that:

> '[T]he conduct [of the representee] must be of such a nature that it could reasonably have been expected to mislead. The expectation [representation] referred to is that of a person who is sought to be bound. But it must be reasonable expectation, that is, conclusion of a reasonable man placed in his position. A court of law would not hold a person bound by consequences which he could not reasonably expect and are therefore not the natural result of his conduct.'

[95] Earlier, I referred to Mr Ipinge's knowledge or ignorance at the time when he made the representation. In considering whether a reasonable person in the position of Mr Ipinge would have prevented prejudice being caused to the appellant, it is necessary to have regard to his general knowledge and surrounding circumstances about the transaction or event which gave rise to Mr Ipinge negligently making the representation.

[96] In this regard, there is no evidence showing that Mr Ipinge knew or ought reasonably to have known what an 'invoice discounting agreement' entailed, namely that the appellant would pay N$521 360 to Ratu in exchange for the debt of N$876 300 as a result of his representation. It appears from the reading of the record that Mr Ipinge is not an articulated or a polished businessman. The record shows that he was incoherent and was not able to answer simple questions or to give clear answers. For instance, a concept of an 'invoice discounting agreement' was mentioned to him over

[13] *Monzali v Smith* 1929 AD 382 at 386.

what appeared to be a short telephone conversation. It is doubtful whether he fully comprehended what was conveyed to him by Ms Walker.

[97] All that the evidence adduced proved was that Mr Ipinge was told that the appellant was 'doing invoice discounting for Inge of Ratu Trading'; that he was required to confirm that the invoices would be paid on 24 January; and finally that the payment needed to be made to the appellant and not to Ratu. No mention was made of the amount of the debt taken over by the appellant which the respondent had to pay. It would appear that his understanding was limited to the fact that the respondent would henceforth be required to pay the appellant and that payment was due on 24 January.

[98] I am fortified in the above view by what Mr Ipinge said in his opposing affidavit to the summary judgment application. He said: '[D]uring November 2016 I received communication from the Plaintiff's representative, a certain Anthea Walker who narrated to me that Ratu Trading CC was indebted to it and that all future payment must be made directly to it'. According to his understanding, the contract between the respondent and Ratu 'was later used [by Ratu] to get funding from the Plaintiff'. This statement demonstrates to me the lack of understanding by Mr Ipinge of the effect of the invoice discounting agreement.

[99] In my view, under those circumstances a reasonable person in the position of Mr Ipinge with same information and knowledge or lack thereof, would not have foreseen that his representation would cause loss to the plaintiff in the amount N$876 300 or any amount for that matter. Put differently, to hold Mr Ipinge bound to the consequences of his representation, which he could not reasonably have expected

and were not the natural result of his conduct would not be in accordance with the underlying principle of equity and fairness as applied by this Court in *Eysselinck*.

Conclusion

[100] In conclusion, taking everything in consideration, I am of the firm view that the court *a quo* was correct when it held that Mr Ipinge could not be held accountable for Mr Walker's reliance on 'the impression' in her mind that he had represented that he had signed the undertaking for the amount claimed.

[101] Having considered the pleadings, the totality of evidence, the findings by the court *a quo* as well the arguments by counsel for the parties, I have not been persuaded that the appeal enjoys any prospect of success. It follows that the application for condonation cannot succeed.

Order

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

(a) The application for condonation is refused.

(b) The appeal is struck from the roll with costs.

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ANGULA AJA

____

SHIVUTE CJ

____

MAINGA JA

APPEARANCES

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