REPORTABLE

CASE NO: SA 41/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HEWAT SAMUEL BEUKES **First Appellant**

ERICA BEUKES **Second Appellant**

and

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA **First Respondent**

MINISTER OF JUSTICE **Second Respondent**

ATTORNEY- GENERAL **Third Respondent**

THE JUDGE PRESIDENT OF THE HIGH COURT **Fourth Respondent**

THE REGISTRAR OF THE HIGH COURT **Fifth Respondent**

THE DEPUTY SHERIFF OF THE DISTRICT OF WINDHOEK **Sixth Respondent**

JOHN BENADE **Seventh Respondent**

LILLY BENADE **Eighth Respondent**

PATRICK KAUTA	**Ninth Respondent**
LOUIS HERBERT DU PISANI	**Tenth Respondent**
NEDBANK NAMIBIA LIMITED	**Eleventh Respondent**
THE REGISTRAR OF DEEDS	**Twelfth Respondent**

Coram: MAKARAU AJA, PRINSLOO AJA and SCHIMMING-CHASE AJA

Heard: **1 November 2023**

Delivered: **6 September 2024**

Summary: This is an appeal from the court *a quo* wherein the appellants brought an application to declare rule 31(5)(a) of the repealed rules of the High Court unconstitutional and declare the default judgment granted by the registrar under rule 31(5)(a) invalid and null and void.

During or about 2001, Erf 4479, Khomasdal, Windhoek, was declared specially executable by the registrar of the High Court, who was empowered to do so by the now repealed rules of the High Court. Subsequently, the property was sold in execution on 24 March 2005 to Mr and Mrs Benade. During 2005 the first application was brought, seeking to set aside the sale in execution.

After that, the application by the appellants was dismissed in March 2006, the appellants appealed to the Supreme Court, but as a result of the non-compliance on the part of the appellants, the Supreme Court struck the application and the appeal was further not prosecuted.

During the year 2011, the appeal was declared to have lapsed. Successively, during or about 2013/2014 the appellants sought similar relief from the High Court, whereby, the Court dismissed the appellants' application.

That is the background upon which this current appeal of the whole judgment of the Court a *quo* is premised.

Held that, the *functus officio* principle lends finality to the conduct of proceedings by marking a definitive endpoint to it.

Held that, the High Court does not have the authority to review or overturn its own decisions, nor does it have appellate jurisdiction over its own decisions.

Held that, the learned judge's finding that there was an unreasonable delay in launching the applications is sound.

Held that, the judge *a quo* correctly held that the High Court had fully and finally exercised its jurisdiction and could not alter or correct its order even with the benefit of hindsight.

Held that, one recognised exception to the *functus* principle is the rescission of a judgment, and the appellants did not apply for rescission of the judgment.

Held that, the High Court is *functus officio* in respect of the dispute between the appellants and the respondents.

Held further that, time is even more of the essence in a case where a constitutional challenge is launched concerning the constitutionality of a statute or rules of court.

Held that, if the appellants were aggrieved with the conduct of the respective legal practitioners, which they clearly are, they have recourse to the Body to which legal practitioners are accountable, ie the Law Society of Namibia.

Held further that, launching a personal attack on legal practitioners who are merely representing their clients and pursuing their mandate is unacceptable.

Held that, there is no reason to shield the appellants from a cost order in this appeal, and there is no basis for deviating from the normal rule that the costs should follow the result.

Held that, the appeal is accordingly dismissed with costs.

APPEAL JUDGMENT

PRINSLOO AJA (MAKARAU AJA and SCHIMMING-CHASE AJA concurring):

Introduction

[1] This is an appeal against the whole judgment and orders by the court a *quo*, handed down on 25 March 2021, whereby the court a *quo* dismissed the appellants' application to declare rule 31(5)(a) of the repealed rules of the High Court unconstitutional and to declare the default judgment granted by the registrar under rule 31(5)(a) invalid and null and void.

[2] This matter relates to a house described as Erf 4479, Khomasdal, Windhoek ('the property'), which was declared specially executable by the registrar of the High Court, predating the current rules of the High Court. The dispute revolves around the validity of the default judgment and the subsequent sale of the property.

[3] The genesis of the dispute began when the South West Africa Building Society (SWABOU) obtained a default judgment against the appellants on 26 November 2001

under case number I 2166/2001. The application for default judgment considered and granted by the registrar included a prayer declaring the property executable. After considering the application for default judgment, the registrar endorsed the order, which read as follows:

> 'Case No I 2166/2001
> Having read the application and supporting papers, default judgment is hereby granted on 26 November 2011 as requested.'

[4] The default judgment was granted for payment of the outstanding balance on the property secured by a mortgage bond against the title deed of the appellants' property.

[5] After granting the default judgment, the registrar issued several notices for the sale in execution of the property.

[6] The property was eventually sold in execution on 24 March 2005 to Mr and Mrs Benade ('the Benades'), the seventh and eighth respondents.

[7] The appeal is only opposed by the ninth and eleventh respondents.

Litigation history

[8] Since the turn of the millennium, the appellants have been involved in various applications and interlocutory applications, which this Court and the court below considered.

[9] To appreciate the litigious nature of the matter, I intend to summarise the history in broad strokes.

A 95/2005 Beukes v Swabou

[10] The appellants launched their first application in 2005 under case A 95/2005, seeking an order, among other things, setting aside the sale in execution, which took place on 24 March 2005. On 11 April 2005, Hoff J, as he then was, struck the application from the roll, and on 30 June 2005, the property was transferred to the Benades.

[11] After ownership of the property was transferred to the Benades, they attempted to evict the appellants from the property by issuing a summons from the Magistrates' Court. This action was later withdrawn.

A 223/2005 Beukes v Swabou

[12] The appellants filed a second application in the High Court under case number A 223/2005, wherein the appellants sought the following orders:

> '1. Setting aside the sale in execution of property on erf 4479, Cr Dodge Ave/Kroon Street, Khomasdal;
> 2. Ordering the third respondent to reverse the transfer of the said property and to restore its ownership to applicants;
> 3. Ordering that the first respondent had forfeited its right to be paid by applicants;
> 4. Declaring the issue of the default judgment by the Registrar of the High Court unconstitutional;

5. Ordering that the Court shall oversee sales in execution of homes;
6. Declaring the sale of a home below its market value unconstitutional;
7. Declaring Sections 66(1)(a) and 67 of the Magistrates Court Act 32 of 1944 unconstitutional;
8. Ordering Respondents to pay the costs of this application.
9. Further and/or alternative relief.'

[13] On 7 March 2006, Muller J dismissed the application. The applicants thereupon lodged an appeal to this Court under case SA 10/2006 on 16 March 2006 but failed to lodge the appeal record timeously. On 16 March 2009, the applicants lodged an application to this Court on notice of motion seeking condonation for their failure to lodge the appeal record timeously. The condonation application was heard on 07 April 2010, and judgment was reserved. On 15 April 2010, the court handed down an order striking the application for condonation off the roll. The reasons were handed down on 5 November 2010.[1]

A 190/2007 Benade v Beukes

[14] During proceedings before Hoff J on 23 February 2009, the Benades sought an order declaring the appeal noted under case A 223/2005 against the judgment of Muller J as having lapsed and an order directing the appellants to vacate the immovable property, failing which the Deputy Sheriff and if need be, with the assistance of the Namibian Police, remove the appellants from the property.

[1] *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10 - 2006) [2010] NASC 14 (5 November 2010).

[15] After hearing comprehensive arguments, Hoff J granted an order in favour of the Benades on 23 May 2011 and ordered that the appellants vacate the property or alternatively be removed by the Deputy Sheriff.[2]

[16] On 23 May 2011, the appellants noted an appeal to this Court under case number SA 38/2011 against the whole judgment of Hoff J. This appeal lapsed on 23 November 2011.

[17] On 29 March 2012, the appellants were notified in writing that the appeal was deemed to be withdrawn due to non-compliance with rule 8(3) read with rule 5(5) of the Rules of the Supreme Court.

A 427/2013 and A 83/2014 Beukes v The President of the Republic of Namibia

[18] In November 2013, the appellants filed an application in the court *a quo* under case A 427/2013 wherein they sought the following relief:

> '1. Declaring Rule 31(5)(a) of the Rules of the High Court unconstitutional and setting aside the said Rule 31(5)(a);
> 2. Declaring the additional directive by the Registrar in granting default judgment by declaring immovable property specifically executable, unlawful and setting aside the said unlawful act;
> 3. Setting aside the writ of ejectment in this matter as a nullity;
> 4. Directing that such Respondents electing to oppose the application pay the costs of the Application.
> 5. Granting Applicants such order or alternative relief as the above Honourable Court may deem fit.'

[2] *Benade & others v Beukes & others* [2011] NAHC 138 (23 May 2011).

[19] On 8 April 2014, the appellants filed a further application under case A 83/2014. The appellants sought the following relief:

> '1. Declaring Rule 31(5)(a) of the Rules of the High Court unconstitutional and setting aside the said Rule 31(5)(a).
>
> 2. Declaring the additional directive by the Registrar in granting default judgment by declaring immovable property, specially executable, unlawful and setting aside the said unlawful act.
>
> 3. Setting aside the notice of sale in execution in this matter as a nullity.
>
> 4. Declaring the collusion of respondents in the said actions to evict applicants and sell the property in question an abuse of both the court and its procedures.
>
> 5. Ordering the 12th respondent to desist from transferring the said property and to reverse the transfer of 2005 into the name of the applicants.
>
> 6. Declaring the collusion of respondents in the said actions to evict applicants and sell the property in question an abuse of both the court and its procedures.
>
> 7. Declaring that 10th respondent in particular undermined the dignity and integrity of the Court.
>
> 8. Directing that such Respondents electing to oppose the application pay the costs of this Application.
>
> 9. Granting Applicants such order or alternative relief as the above Honourable Court may deem fit.'

[20] In support of the relief sought in the two matters referred to above, Mr Beukes deposed to the founding affidavits, and these affidavits were almost a blueprint of each other. The gist of the applications was that the default judgment was granted in terms of rule 31(5)(a) of the Rules of the High Court (old rules), which resulted in the registrar

exercising judicial power which conflicts with Articles 12 and 78(1) of the Namibian Constitution. Rule 31(5)(a) was also said to conflict with the appellants' fundamental right to administrative justice, which requires an administrative official to act fairly and reasonably in compliance with the common law and other legislation. It was further contended that the registrar acted *ultra vires* his competence when he granted the order declaring the immovable property in question executable.

[21] In both instances, the relief sought was opposed.

[22] The court *a quo* was faced with a consolidated application that primarily involved the same parties, and the issues for determination were identical. As a result, the cases were consolidated under case A 83/2014.

I 2197/2009 Nedbank Namibia Limited v Benade

[23] Nedbank Namibia instituted proceedings against the Benades regarding the immovable property in question. As of 14 August 2009, the balance owed to the bank amounted to N$412 886.86, which accrued interest at a rate of 20 per cent per annum.

[24] When the appellants instituted the applications under case numbers A 427/2013 and A 83/2014, the Benades still had not received occupation of the property. Whilst this is not relevant to the issue between the parties before this Court, it is relevant to the background information set out herein.

<u>The proceedings in the court *a quo*</u>

[25] In reaching a decision, the learned judge first and foremost considered the declarators sought in prayers 1 and 2 of the appellants' notice of motion. The learned judge held that given the fact that the rule called upon to be considered was repealed when the current rules of the High Court, which provide for judicial oversight in the declaration of property executable, in terms of rule 108, were promulgated, a court could not properly declare the repealed rules unconstitutional.

[26] The learned judge opined that declarations of invalidity or unconstitutionality apply in matters where the statute or other instrument sought to be declared invalid or unconstitutional is in existence at the time the declarator is filed with the court. The learned judge held the view that it would be improper to attempt to resurrect repealed rules and purport to declare them unconstitutional 'posthumously' because to do so would result in a fruitless academic exercise.

[27] The learned judge further held that if the law-giver repeals legislation (primary or subordinate), the court may not, subsequent to the repeal, interrogate the validity of the said legislation and decide on its constitutionality and validity.

[28] The second issue considered by the court a *quo* relates to the declaration of invalidity of the default judgment granted by the registrar and the subsequent process of declaring the property specially executable. The learned judge noted that the appellants attempted to have the orders issued by the registrar set aside by the High Court but

without success. When the appellants appealed to the Supreme Court, the appeal was never prosecuted to completion.

[29] Relying on *Maletzky v The Government of the Republic of Namibia,*[3] the court *a quo* held that the current matter was on all fours with that case, and with which the judge actively associates himself. The court in *Maletzky* held that when the registrar, under the old rules, granted the relief sought, including the default judgments, that office was authorised by law to do so at the time. Therefore, unless the court found that the conduct of either the registrar or the clerk complained of in the default judgment granted was capricious, *mala fide* or malicious, their actions were valid and in keeping with the law of the time.[4] The court finally noted that the amendment of the High Court's rules did not, in any shape or form, intimate any retrospective application of the rules.

[30] The court *a quo* concluded that it would not be appropriate or legally correct to grant the declarators sought by the applicants, stating that the registrar of the court acted in an invalid manner when granting the orders complained of.

[31] A further issue the court considered was the inordinate delay in launching the proceedings, given that the origin of the matter dates back to 2005 and the application was lodged in 2014. In determining whether the applicants were non-suited as pleaded by the respondents, the court *a quo* had regard to *Keya v Chief of the Defence Force*[5] and held that although the application before the court was not strictly speaking a

[3] *Maletzky v The Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2017/00148) [2019] NAHCMD 142 (2 May 2019).
[4] *Ibid* para 24.
[5] *Keya v Chief of Defence Force & others* 2013(3) NR 770 (SC).

review, the sentiments expressed in the *Keya* matter resonates in light of the prejudice suffered by the innocent third parties. The learned judge found that the applicants 'rested on their laurels for nine years' before bringing the present proceedings and held that the period taken by the applicants before launching the application was unreasonable. Yet, despite the extensive delay, the applicants neither explained the delay nor sought condonation for the delay. As a result, the court upheld the point raised regarding unreasonable delay.

[32] The court made the following order in respect of the primary relief sought:

> '1. The application to have Rule 35(5) (sic) of the repealed Rules of this Court declared unconstitutional is refused.
> 2. The application for the Registrar's directive declaring immovable property specially executable, invalid and unlawful is hereby refused.
> 3. The application to declare the ejectment of the Applicants unlawful as a result of the orders sought and refused in prayers 1 and 2 above, is refused.
> 4. The order declaring the processes as excursed by the Respondents, is hereby refused.
> 5. An order restraining the Registrar of Deeds from transferring the property in question into the name of any person is refused.
> 6. The Applicants are ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved, consequent to the employment of one instructing and one instructed counsel, where so employed.
> 7. The matter is removed from the roll and is regarded as finalised.'

[33] As an *obiter* note, the learned judge further addressed the propriety of litigants, citing legal practitioners in litigation representing their clients as parties to the

proceedings when it is clear that whatever allegation is made against them stems from them carrying out their duties.

[34] In the current instance, Mr Kauta and Mr Du Pisani, representing the Bank and the Benades, respectively, were cited as parties to the proceedings because they represent their clients. The court remarked that no reasons were advanced for citing these legal practitioners in the proceedings and that whatever allegations were made against them stemmed from them carrying out their duties.

[35] In this regard, the court *a quo* contended that the International Bar Association Standards (IBA) on the Independence of the Legal Profession equally finds application in Namibia in that the independence of the legal profession and independence of legal representatives is critical and key to the protection and guaranteeing of human rights.

[36] The learned judge held the view that when litigants, against whom a legal practitioner acts in the interest of his or her client, sue the legal practitioner, this affects the legal practitioner's independence and effectiveness, and in turn it affects the protection of the individual litigant’s right to legal representation and the proper exercise of their human rights.

[37] The learned judge *a quo* pointed out that if a legal practitioner violates their oath of office, the aggrieved party can seek recourse by approaching the Law Society for the matter to be investigated and appropriate measures to be taken.

<u>The grounds of appeal</u>

[38] The appellants appealed against the whole judgment and orders of the court *a quo*, and the grounds are summarised as follows:

i. The court a *quo* erred in dismissing the appellants' application regarding a default judgment granted by the registrar of the High Court in 2001, given that it was illegal. Further, the court a *quo* erred in refusing to declare rule 35(5)(a)[6] of the rules of court unconstitutional.

ii. The court a *quo* erred in giving effect to a writ of ejectment without a valid and enforceable court order and despite a pending appeal.

iii. The court erred in giving effect to a writ of execution, especially when there was no valid and enforceable court order and without considering the provisions of rule 108 regarding judicial oversight despite a pending appeal.

iv. The court a *quo* failed to afford the appellants a fair hearing as envisaged by Article 12 (1) (a) of the Namibian Constitution, as it disregarded material facts or evidence placed by the appellants before the court.

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[6] From a consideration of the record, the issue is on default judgment. Therefore, there is possibly a mistake as regards which rule must be referred to. It should be rule 31(5)(a) and not the abovestated rule. Moreover, where the appellant refers to rule 31(5)(a), reference is made to the repealed Rules of the High. Court promulgated under Government Gazette No 59 of 1990 issued on 10 October 1990, which were repealed in Government Gazette No. 5392 dated 17 January 2014.

v. The court a *quo* ‘muddled the judicial proceedings’ by consolidating matters with distinct and different causes of actions and legal remedies.

vi. The court a *quo* erred in concluding that the appellants sought the setting aside of non-existing legislation, whereas the cause of action arose under the rule of court authoring the registrar to grant a default judgment at the time.

vii. The court a *quo* erred in failing to refer the acts of certain legal practitioners who acted unlawfully to the Law Society or the Disciplinary Committee and for failing to allow the citation of these legal practitioners.

viii. The proceedings in the court a *quo* are replete with irregularities and deprived the appellants of a fair hearing given that there were re-assignments of managing judges and allowed or coercing parties that did not oppose the appellants’ application to oppose in wanton disregard of the rules of court.

<u>The relief sought by the appellants</u>

[39] As part of their notice of appeal, the appellants seek several orders, ie.

(a) declaring the default judgment void and setting aside the default judgment;

(b) declaring the court proceedings and orders founded upon the default judgment void *ex tunc* and setting aside those proceedings and orders;

(c) restoring the status *quo ante* of the exclusive and unrestricted possession and ownership of the property;

(d) ordering cost of appeal against the respondents opposing the appeal; and

(e) granting any further and/or alternative relief the Supreme Court deems appropriate.

Submissions before this Court

The appellants

[40] The appellants' main grievance is twofold. Firstly, they maintain that the default judgment granted by the registrar under the old rules of the High Court is void *ab initio* and that the court proceedings and orders founded upon that default judgment are void *ex tunc* and cannot have any force or effect in law. Secondly, that a void judgment cannot be made valid or operative due to delay in rescinding the judgment, nor can it be cured by any subsequent proceedings; it remains void.

a) Voidness of the judgment

[41] Mr Beukes, arguing on behalf of both appellants, contended that the court a *quo* erred in finding that it is wrong to attack the constitutionality of legislation ‘posthumously’ as the applications to declare the rule in question unconstitutional was launched in 2013 and 2014, respectively. He further contended that whether the rule has been repealed or not, it shall be declared unconstitutional when the court is asked to do so.

[42] In respect of the voidness of the default judgment, Mr Beukes contended the following:

(a) The 'judgment' by default granted by the registrar is not a judgment of the court as the registrar is not a judge appointed in accordance with the Namibian Constitution and cannot assume judicial authority or power to grant judgments. The registrar is appointed by the Minister responsible for justice in terms of the Public Services Act and performs administrative work for the court. Neither the Constitution nor any act confers judicial authority on the registrar.

(b) By comparing Namibian legislation with South African legislation, Mr Beukes submitted that s 23 of the South African Superior Courts Act 10 of 2013[7] confers power or authority on the registrar to grant judgments by default. The Namibian Supreme Court Act 15 of 1990 does not contain a similar provision.

(c) Rule 31(5) was repealed because it was unlawfully enacted. This is also why the new rule 15 excludes the provision that the registrar may grant default judgments.

[43] It was further contended that the repealing of the old rules of court does not affect the rights of the appellants as s 11(2)(*c*) and (*e*) of the Interpretation of Laws

[7] '23. A judgment by default may be granted and entered by the registrar of a Division in the manner and in the circumstances prescribed in the rules, and a judgment so entered is deemed to be a judgment of a court of the Division.'

Proclamation 37 of 1920 (the Proclamation) provides that where 'a law repeals another law, then, unless the contrary intention appears the repeal shall not:

> a) . . .
>
> b) . . .
>
> c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under the law so repealed; and
>
> d) . . .
>
> e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, forfeiture, or punishment as is in the subsection mentioned; and any such investigation, legal proceedings, or remedy may be instituted, continued, or enforced, and any such penalty forfeiture, or punishment may be imposed, as if the repealing law had not been passed.'

[44] In further support of his argument, Mr Beukes submitted that the rights and obligations imposed consequent upon impugned rules must be dealt with under those provisions, as the court did in *Hendrik Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority.*[8] In the said case, the court raised the validity of a default judgment granted in terms of rule 31(4) (repealed) *mero motu*. It proceeded to determine the rules applicable at the time. Mr Beukes is of the view that if the court was of the view that because the rules were repealed or no longer applied in 2016, as the court *a quo in casu* did, this Court would not have determined the matters brought on appeal on the same issue but would have held that it was *res judicata* and not to be determined. Still, the court did not take that view in light of the provisions of the Proclamation. Instead, this Court declared the High Court judgment void in accordance with established principles of law.

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[8] *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* 2019 (4) NR 1109 (SC).

[45] Mr Beukes contended that the court *a quo* conceded in its judgment that the registrar was not vested with judicial power. In this regard, he referred to para 24 of the judgment where the learned judge a *quo* referred to *Hiskia v The Body Corporate of Urban Space*[9] and stated, 'It is true that from the judgment of this court in *Hiskia v The Body Corporate of Urban Space*, the rules complained of were unconstitutional. I say this cognisant the matter related to the rules of the Magistrates Court'.

[46] He argued that, through comparative reasoning, the *Hiskia* case had declared rule 12(1)(a) of the Magistrates' Court Act 32 of 1944 unconstitutional or invalid, and consequently set aside the default judgment because the clerk was not vested with the judicial power to grant a judgment. The registrar, being in a similar position, would also not be vested with judicial power, and therefore, rule 31(5), which purportedly grants such power, must be invalid, and anything done in terms thereof must be void.

[47] Consequently, the default judgment granted by the registrar is a void act, and any proceedings founded upon it are incurably bad as there is no basis for any consequential proceedings. The plaintiff in the court *a quo* was, therefore, not entitled to issue a writ or a notice of attachment and sale in execution or effect transfer of the property. The fact that the plaintiff in the court *a quo* succeeded in obtaining a writ and the attachment and sale in execution does not justify the default judgment or clothe it with validity.

[9] *Hiskia v The Body Corporate of Urban Space* HC-MD-CIV-MOT-GEN-2017/00148 (31 August 2018), per Ueitele J.

b) Unreasonable delay or egregious delay in proceedings

[48] Mr Beukes criticised the court a *quo* for distinguishing between the current matter and the *Hiskia* matter when the learned judge stated further in para 24 of his judgment:

> '. . .The reasoning does, however appeal and apply to the present matter. The only difference is that in *Hiskia* the application for declaration of invalidity was moved during the lifetime of the relevant legislation. It cannot be moved, as I have said, 'posthumously', as the applicants have done.'

[49] He further submitted that the court *a quo* not only erred in distinguishing the two cases based on the application being brought during the lifetime of the relevant legislation, but the judge also failed to apply the Proclamation and the common law. The reason for the criticism is that the appellants 'moved against' the default judgment as early as 25 July 2005 under case A 223/2005, and thereafter, they brought at least three cases in the High Court and two appeals before this Court and opposed several applications in the High Court. According to Mr Beukes, they attacked the default judgment in all these proceedings.

[50] He stated that cases A 427/2013 and A 83/2014 were lodged before the repeal of rule 31 on 16 April 2014. Thus, it is not the case that rule 31 was not impugned before that date, and there was thus no egregious delay as held by the court a *quo*.

[51] Mr Beukes further contended that the current matter should be distinguished from the *Maletzky* case,[10] which the court a *quo* followed in deciding this matter. The application in the *Maletzky* case was brought in 2017, well after the repeal of the old rules. He was, however, of the view that the *Maletzky* matter was, in any event, decided on the wrong basis as the court did not apply s 11(2) of the Proclamation nor did the court consider or follow the *Hendrik Christian* matter,[11] which it should have done as it is a judgment of a higher court and Article 81 of the Constitution applies.

[52] It was submitted that the relief sought in the court *a quo* was not for the court to apply a new law or rule with retrospective effect as the court *a quo* expressed in para 31 of the judgment. According to Mr Beukes retrospectivity is not what is at play here as the appellants' *causa* is governed by s 11(2) of the Proclamation. This essentially means that the cause of action that arose under the repealed law must be dealt with under the repealed law, and the fact that the old rules were repealed cannot constrain their cause of action.

[53] In response to the court *a quo*'s finding that the High Court became *functus officio,* Mr Beukes again drew this court's attention to the fact that the appellants first challenged the validity of rule 31(5) in 2005 and, after that, disputed every process consequent upon the default judgment. These court processes, according to Mr Beukes, perpetuated unfairness and injustice towards the appellants, who are elderly

[10] Footnote 3 supra.
[11] Footnote 8 supra.

and have been reduced to living in the property in question in squalor without running water and electricity from 2005 to date.

[54] In conclusion, regarding the remarks by the court below regarding the citing of the legal practitioners, Mr Beukes elected not to make extensive remarks apart from contending that the actions by the legal practitioners were perceived as wrongful and not that of their clients. The citation of the legal practitioners in the proceedings was considered appropriate by the appellants as the acts of the legal practitioners directly affected the rights and obligations of the parties. Lastly, Mr Beukes believed that the court a *quo* should have enquired into the complaints and referred it to the disciplinary committee of the Law Society.

On behalf of the ninth to the eleventh respondents

[55] The respondents mentioned above filed comprehensive heads of arguments for the court's assistance.

[56] Mr Phatela first and foremost pointed out that the current appeal is not new. As his main point of departure, he addressed the court *a quo*'s finding that it is *functus officio*.

[57] Mr Phatela contended that the appellants’ prayer seeking a declaration that the registrar’s granting of the default judgment and declaring the property specially executable as invalid is not the relief that is available to the appellants. The reason

being that the appellants already attempted to obtain this specific relief in the High Court, without success, when it was dismissed by Muller J. The appellants pursued an appeal against the judgment of Muller J. Still, the appellants failed to take the appeal to finality as it already faltered when they could not cross the hurdle of condonation.

[58] The appeal was never pursued further, and as a result, the judgment in the High Court stands. The court *a quo* correctly concluded that that court is *functus officio*, having fully and finally exercised its jurisdiction in the matter. Mr Phatela submitted that the court *a quo* could not, with the benefit of hindsight, find that it erred, altered, or corrected its order.

[59] Mr Phatela contended that the defence of *res judicata* is applicable concerning the relief claimed. In this regard, the court was referred to *Sylvie Mcteer Properties v Kuhn & others,*[12] where it was held that once a court has given a final judgment on a matter, it becomes *functus officio* and cannot correct or alter its judgment. This Court further stated that where judgments and orders are valid, unimpugned and lawfully granted, such orders have final effect. Therefore, in the absence of such orders, a litigant cannot seek to have such orders varied as the appellants have done in the current instance.

[12] *Sylvie McTeer Properties v Kuhn Michael Karl-Heinz & others* (12 of 2005) [2017] NASC 33 (15 August 2017).

[60] Counsel further pointed out with reference to the *Mcteer* matter that it is in the public interest that litigation is brought to finality, something that did not happen in the current matter.

[61] Mr Phatela further contended that the *res judicata* principle also applies to the relief sought in this matter. He submitted that although the common law principle of *res judicata* may be relaxed in special circumstances to provide the aggrieved party with an effective remedy, that can only be made in exceptional circumstances where the liberty of the subject is involved and where the earlier decision is demonstrably made on a wrong application of the law to the facts, which resulted in a manifest injustice. On this score, counsel contended that the appellants failed to meet the requirements that would justify this court's invocation of the special powers pertaining to *res judicata*.

[62] In conclusion on this issue, Mr Phatela submitted that despite the litany of applications, which included the attack on the subsequent steps of execution of the default judgment, the default judgment itself at all material times remained intact. The appeal against the judgment of Muller J under case A 223/2005 was never properly prosecuted, and Hoff J specifically ordered and declared on 23 May 2011 that the appeal against the judgment of Muller J had lapsed. This was pursuant to the striking of the appellants' appeal by this Court on 5 November 2010. As a result, the appellants had no legal basis to approach the court *a quo*, seeking the relief set out in their notices of motion, yet they still pursue it in the current appeal.

[63] In a different vein, Mr Phatela urged the court to give consideration to the application of its powers in terms of the Vexatious Proceedings Act 3 of 1956 and the common law. Counsel further urged the court to stop the groundless and persistent legal proceedings by the appellants. He pointed out that through the years, the appellants launched multiple proceedings against the respondents, specifically the ninth and the eleventh respondents, who incurred great expense in opposing these proceedings, and this Court will thus be justified in invoking its powers under the said Act. This is exacerbated by the fact that the appellants still occupy the property in flagrant disregard of several court orders.

[64] Mr Phatela reminded the court that the application challenging that decision by the registrar was launched in 2005 and disposed of in 2006 by Muller J. The appeal thereto was struck from the roll by the Supreme Court in 2010. However, even though a competent court of law disposed of the matter, the appellants remain in non-compliance with the court orders, making a dash for the same law to be meted out to those who have complied with the same law.

[65] Lastly, Mr Phatela addressed the court extensively about the attacks by the appellants on the legal practitioners and the different judges who attended to the matters over the years. He argued that the courts have held that statements which cast gross and unwarranted aspersions on the integrity of the courts (and its officials) are to be ceased. This is so because it can potentially lower public confidence in the

impartiality, integrity, and independence of the court and the judiciary, thereby undermining public confidence in the administration of justice.

Issue for determination

[66] The issue for determination is simply whether this Court should interfere with the judgment of the court *quo*, specifically regarding its findings on the principles of *functus officio* and extensive delay.

[67] The outcome of those findings will determine if this Court needs to consider the constitutional challenge that the appellants raised against rule 31(5)(a) of the repealed rules of court.

The doctrine of *functus officio*

[68] *Functus officio* is a Latin expression that translates to 'having performed his or her office'. The origins of the *functus officio* doctrine can be traced back to ancient times. The Roman jurist Ulpian (c. 170–228 AD) had written about it and explained the effect of the *functus officio* doctrine in the context of judicial decisions as follows:

> '*Judex posteaquam semel sententiam dixit, postea judex esse desinit; . . . ut judex qui semel vel pluris vel minoris condemnavit amplius corrigere sententiam suam non possit; semel enim seu male sou bene officio functus est*.'[13]

[69] This means that after a judge has articulated his judgment, he immediately ceases to be the judge; so that a judge who has given judgment, either in a greater or a

[13] Justinian's Digest. Digest 42.1.55.

smaller amount, no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty.[14]

[70] The *functus officio* principle, therefore, lends finality to the conduct of proceedings by marking a definitive endpoint to it. The pinnacle of all judicial proceedings is a valid and final decision, and with finality comes legal certainty. It is essential to have a clear stopping place, a point of no return; otherwise, there would be no end to the case nor any beginning of enforcement.

[71] The High Court does not have the authority to review or overturn its own decisions, nor does it have appellate jurisdiction over its own decisions. This means that one High Court judge cannot pass judgment on another High Court judge's decision, nor can the High Court reconsider its own decisions.

[72] The High Court is tasked with considering the issues between the parties ventilated during the action or motion proceedings and deciding them in a considered judgment. Subject to a few well-known exceptions to the rule, the court is *functus officio* once it has pronounced its order in the matter and cannot correct, alter, or supplement it.[15]

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[14] Translation in Daniel Malan Pretorius, "*The Origins of the Functus Officio Doctrine, with Specific Reference to Its Application in Administrative Law*" (2005) 122:4 SALJ 832 at 836.

[15] *Road Accident Fund & another v Mdeyide* 2011 (2) SA 26 (CC) at 52F para [96]; *Brown & others v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524J para [24]; *Bekker No v Kotzé & another* 1996 (4) SA 1287 (NM) at 1290G and *Firestone SA (Pty) Ltd v Genticuro AG*1977 (4) SA 298 (A) at 306.

[73] In *Mukapuli & another v SWABOU Investments (Pty) Ltd & another,* [16] Langa AJA stated as follows:

> 'A judge of the High Court does not have the jurisdiction to review earlier proceedings between the same or essentially the same parties before another judge of the High Court. The court that has the legal authority to adjudicate the complaint by the appellants that the High Court violated their fundamental rights to a fair trial is the Supreme Court.'

[74] Damaseb DCJ stated as follows in *Sylvie Mcteer Properties V Kuhn & others,*[17] also with reference to the *Mukapuli* matter:

> '[33] It is in the public interest that litigation be brought to finality: litigants must be assured that once an order of court is made, it is final and they can arrange their affairs in accordance with that order. It is trite that where an order is final in nature, a subsequent court of equivalent jurisdiction cannot sit in review of those orders, unless new facts are presented or it is impugned in terms of rule 44(1)(a). Failing that, the High Court remains *functus officio* and may not set aside its own judgment or order. (*Mukapuli and Another v Swabou Investment (Pty) Ltd and Anothe*r 2013 (1) NR 238 (SC) at 240I – 241C.) The reason is that once the court becomes *functus officio*, its jurisdiction in the matter is fully and finally exercised and its authority over the subject matter ceases.'

[75] From the onset, it is necessary to point out that the appellants were very economical with the facts regarding the court's finding that it was *functus* and the defence raised in this regard by the respondents. The appellants merely submitted that they disputed every process consequent upon the default judgment, and left it at that. In reply to Mr Phatela's argument on the defence raised by the respondents of the High

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[16] *Mukapuli & another v SWABOU Investments (Pty) Ltd & another* 2013 (1) NR 238 (SC) para 14.
[17] *Sylvie Mcteer Properties V Kuhn & others* 2017 (4) NR 929 (SC) 938 C-D.

Court being *functus officio*, Mr Beukes, for the very first time, stated that none of the courts dealt with the constitutionality issue and further submitted that the doctrines of *functus officio* and *res judicata* do not apply.

[76] This is interesting as the respondents, from the onset, pinned their colours to the mast and pleaded that the High Court was *functus officio*, and the relief became *res judicata*. Nothing appears to have been placed before the court *a quo* to prove the contrary, considering the onus was on the appellants to make out their case in the court *a quo*.

[77] The history of this matter is common cause between the parties. It is common cause that Muller J was seized with case A 233/2005, and the relief in that matter sought by the appellants was, *inter alia*, a declarator that the default judgment granted by the registrar was unconstitutional.

[78] The application by the appellants was dismissed by Muller J in March 2006. The appeal against the judgment of Muller J was filed on 16 March 2006, but as a result of the non-compliance on the part of the appellants, the Supreme Court only considered the condonation application of the appellants on 7 April 2010. The application for condonation did not succeed, and in the judgment on the condonation application, Langa AJA concluded that there was no proper case for condonation to be granted and remarked:

> 'I have borne in mind that prospects of success are often an element, sometimes an important factor, that could influence a decision whether or not to grant condonation in a proper case. It is however also true that, in the jurisprudence of both South Africa and Namibia, although prospects of success would normally be a factor in considering whether or not condonation should be granted, this is not always the case when non-compliance of the Rules is flagrant and there is glaring and inexplicable disregard of the processes of the Court. (*Rennie v Kamby Farms (Pty) Ltd* 1989(2) SA 124 (A) at 129 E-J; *Moraliswani v Mamli,* 1989(4) SA 1 (A); *S V Wellington* 1990 NR 20 (HC), 1991 (1) SACR 144 (Nm); *Swanepoel v Marais and others* 1992 1 NR (HC). In this case, having had regard to Muller J's judgment as well as the arguments both written and oral, I remain unpersuaded that there are factors which could tilt my decision in favour of granting condonation. The application has been characterised by unexplained gaps and cannot succeed in its present form.'[18] (underlined for emphasis)

[79] The court, having considered the appellants' arguments and Muller J's judgment, was clearly not impressed with the case advanced by the appellants. Hence, the condonation application was struck off the roll?. The appeal was not further prosecuted, and Hoff J declared on 23 May 2011, on application by the Benades, that the appeal under case number A 223/2005 had lapsed.

[80] Fast-forward to 2013/2014, and the appellants sought similar relief, albeit more refined, from the High Court. In the current instance, the appellants sought, amongst other things, a declarator declaring rule 31(5)(a) unconstitutional, declaring the additional directive by the registrar declaring the immovable property specifically executable unlawful, and for the court below to set that order aside. The primary relief in both applications remained the same as in the 2005 application, ie a declaration of

[18] *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10 - 2006) [2010] NASC 14 (5 November 2010) para 20.

unconstitutionality of rule 31(5)(a). Much of the relief sought would be the natural consequences of such a declaration of unconstitutionality.

[81] It is common cause that the appellants never pursued the appeal against Muller J's judgment. Therefore, Muller J's judgment remains extant. The judge *a quo* thus correctly held that the High Court had fully and finally exercised its jurisdiction and could not alter or correct its order even with the benefit of hindsight.

[82] One recognised exception to the *functus* principle is the rescission of a judgment. The appellants did not attempt to rescind Muller J's order when they had the opportunity.

[83] The appellants treated this litigation with a revolving door policy, wanting the court to revisit the same issues repeatedly. No society, nor the average litigant could afford a justice system with a revolving door policy. For an example of the devastation this approach can cause, one must look no further than to the Benades, who innocently purchased the immovable property in question. The persistent litigation by the appellants financially ruined the Benades. As indicated earlier when I discussed the litigation history of this matter, Nedbank sued the Benades under I 2197/2009 when they fell into arrears with their bond payments in respect of the property. A property for which they took a loan to pay the capital and, to this day, never had the benefit of sleeping one night in that house.

[84] I am of the considered view that there comes a time in the lifetime of every case when the parties must accept the court's decision and move on. In the current dispute, that time came and gone long ago. Even more so when the window for appeal has lapsed and the judgment of the court *a quo* in case A 223/2005 stands.

[85] Therefore, the High Court is *functus officio* in respect of the dispute between the appellants and the respondents.

Void judgment and *res judicata*

[86] The appellants argued that the default judgment granted by the registrar was void and could not be made valid or operative due to a delay in rescinding the said judgment and could therefore not be *res judicata*.

[87] Prior to the repeal of the old rules of court on 17 January 2014, the registrar derived powers from rule 31(5) of the rules of court, as amended by Government Notice No 81, published in Government Gazette 1293 of 16 April 1996. The relevant provisions read as follows:

> '(5)(a) Wherever a defendant is in default of delivery of notice of intention to defend an action where each of the claims is for a debt or liquidated demand, the plaintiff, if he or she wishes to obtain judgment by default, may file with the registrar a written application for judgment against such defendant, instead of following the procedure prescribed by subrule (2).
> (b) The registrar may-
> (i) grant judgment as requested;

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as he or she may consider just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court.

(c) The registrar shall record any judgment granted or direction given by him.

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he or she has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

(e) . . . .

(f) . . . .'

[88] In *Erf 1382 Sunnyside (EDMS) BPK v Die Chipi BK,*[19] Spoelstra J held that the intention of the rule is clear and that it confers the registrar with "the power to make all orders and to adjudicate all those matters which previously had been decided by the court in terms of rule 31(2) and where no evidence was required to prove the amount of claim or the cause of action…"

[89] Rule 31(5)(d) (repealed) provided for judicial oversight as a remedy to a party dissatisfied with a default judgment granted against them in terms of rule 31(5)(*a)*. Such dissatisfaction could, within 20 days after acquiring knowledge of such judgment or direction, set the matter down for reconsideration by the court.

[90] The basis of the appellants' complaint is that the default judgment granted by the registrar is void and, as such, not a judgment of the court. Mr Beukes also compared

[19] *Erf 1382 Sunnyside (EDMS) BPK v Die Chipi BK* 1995 (3) SA 659 (T) at 660 E-G.

the Namibian position with that of South Africa, where s 27A, which was inserted in the South African Supreme Court Act 10 of 2013, is a deeming provision, which, read with r 31(5) of the Uniform Rules of Court, empowers the registrar of the High Court, save in circumstances involving residential property, to grant default judgments.

[91] The fact that a similar deeming provision was not inserted in the Namibian Supreme Court Act is of no moment as the old court rules were repealed on 17 January 2014. The amendment affecting the insertion of s 27 in the South African Supreme Court Act deeming provision occurred in 2013 only. Prior to the amendment, the registrar obtained the authority to grant default judgments from the Rules of Court only. The Namibian Rules of Court read similarly to the South African Uniform Rules of Court.

[92] Due to the enabling rules, a default judgment compliant with rule 31 was not *ab initio* void, as argued by Mr Beukes. The old court rules provided the necessary platform for judicial oversight to be exercised over a judgment granted by the registrar. The procedure set out in rule 31(5)(d) was not a procedure of first instance but operated with retrospect, as an aggrieved person could have the judgment granted against him reconsidered by the court. When the court reconsidered the matter, it exercised judicial oversight.

[93] However, these rules were redrafted, and the current rules have been operational since 2014. The current court rules introduced, amongst other things, methods of exercising judicial oversight over default judgment proceedings and the

pursuant process regarding the executability of immovable property. The argument advanced that the rules were amended because the old rules were unlawfully enacted is, in my view, without substance.

[94] Interestingly, the appellants chose not to apply for rescission of the default judgment, and the purported voidness of the default judgment only arose in the 2013/2014 applications.

[95] I am of the view that the High Court became *functus* in dealing with this matter, and the relief sought also became *res judicata*.

Unreasonable delay

[96] This court noted that the parties dealt with the issue of unreasonable delay in their heads of arguments, but this specific issue does not pertinently form part of the grounds of appeal. However, the court a *quo* made a definitive finding in this regard, and I will, therefore, briefly deal with the delay issue.

[97] The appellants vehemently denied that there was an unreasonable delay in launching the current proceedings. They were critical of the court *a quo*'s finding that the period taken by the appellants before launching the application(s) was unreasonable, as nine years lapsed between the actions giving rise to the application and its lodging.

[98] The nine years were calculated from 2005 when the court dismissed the appellants' application under case A 223/2005. The appellants' actual cause of complaint arose in 2001 when the registrar granted the default judgment and relief pursuant to the granting of the default judgment. The appellants' appeal was dismissed in November 2010, and Hoff J held in May 2011 that the appeal lapsed. Therefore, at least a further three years have passed since the appellants' condonation application was struck from the roll before the 2013 application was launced.

[99] The learned judge *a quo* relied on *Keya v Chief of the Defence Force & others,*[20] which was decided in the context of a judicial review. Still, he was of the view that the principles set out in *Keya* were equally applicable to the application before him. The learned judge's reasoning in this regard was sound when he stated that it is an issue of public interest.

[100] I agree, and in my view, time is even more of the essence in a case where a constitutional challenge is launched concerning the constitutionality of a statute or rules of court, as is the case in the current instance. This is so because of the public interest in finality and certainty. *In casu*, the litigants based their actions on the assumption of the lawfulness of the rules, and the declaration of invalidity of a rule would cause the undoing of a myriad of consequent actions.

[101] O'Regan AJA stated as follows on the issue of delay in *Keya*, with which I fully associate myself:

[20] *Keya v Chief of the Defence Force & others* 2013 (3) NR 770 (SC) para 22.

> [22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[102] The appellants' case was further weakened in the court below by their failure to provide any explanation for the extended delay, nor did they apply for condonation in this regard.

[103] If I understand the appellants' arguments correctly, it would appear that they were embroiled in other litigation during this period. It is unclear if that is what they offer to explain the delay.

[104] I am of the view that the learned judge's finding that there was an unreasonable delay in launching the applications is sound.

The attack on the constitutionality of rule 31(5)(a) (repealed)

[105] I am of the considered view that the issue of the unconstitutionality of rule 31(5)(a) need not be considered in light of the findings of the *functus officio* principle and undue delay.

[106] In *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others,*[21] Shivute CJ remarked as follows:

> 'This Court has over the years adopted the approach that a Court should decide constitutional issues only when it is absolutely necessary. In this connection, we are inclined to reaffirm the approach of this Court in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 at 184A-B that it should decide no more than what was absolutely necessary for the decision of a case. Constitutional issues in particular ought to be developed cautiously, judicially and pragmatically if they were to withstand the test of time.'

[107] This approach is still the position today, and I believe it should also apply to the matter before us.

Other grounds of appeal

[21] *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC).

[108] The appellants also raised other grounds of appeal apart from those described above. These are the consolidation of the matters and the purported irregularities in the proceedings in the court a *quo*, which deprived the appellants of a fair hearing. If I understand the latter correctly, the appellants complain that the cases were reassigned to a different managing judge and that parties who did not oppose the appellants' application were allowed or coerced to oppose their application, disregarding the court rules.

[109] It is not clear what the purported irregularities would constitute. The appellants did not present any argument on these issues. In any event, these aspects pertain to the conduct of the hearing and should be reviewed, not appealed against, as they do not relate to the merits of the case.

Attack on the officers of the court

[110] The appellants filed a host of irrelevant documents for the purposes of this appeal. Mr Phatela took serious issue with the allegations made by the appellants in some of these documents. The allegations that caused the upset were directed to the ninth and tenth respondents in their capacity as the legal representatives of the Benades and Nedbank.

[111] One such document is filed under the heading 'FILING NOTICE: ABUSE OF COURT AND COURT PROCESS'. This document, although filed as a document of record, is addressed to the ninth respondent. Apart from this document, Mr Beukes also

filed several affidavits wherein he made spurious statements aimed not only at the ninth respondent as the legal representative of Nedbank but also, for some reason, chose to involve the ninth respondent's wife, who is not a party to the proceedings. The tenth respondent, who was the legal representative of the Benades, was also not spared the wrath of the appellants, and neither was the registrar and the judges of the High Court.

[112] The appellants made allegations of collusion, perjury, fraud, and dishonesty against the ninth and tenth respondents, who were also cited as parties to the application under case A 83/2014.

[113] The appellants are clearly disgruntled, but they went to town in the affidavits filed of record regarding the high court judges, the registrar, and legal practitioners. In response to Mr Phatela's complaint, Mr Beukes justified these statements by saying that the respondent's statement (it is unclear which respondent was referred to) on the affidavit portrays himself and the second appellant without regard for their dignity.

[114] In *Roome v Roome,*[22] Davis J remarked as follows when a litigant in a matrimonial dispute made disparaging remarks and spurious allegations against a legal practitioner:

> 'These allegations should not have been made against lawyers trying to represent their client, legally to the best of their ability. The deponent should have respected their integrity, which they deserve. Legal representatives, being attorneys and advocates,

[22] *Roome v Roome* (18741/2007) [2008] ZAWCHC 312 (10 December 2008).

> have only one component of trading stock. That is their integrity. Without integrity, no attorney, nor advocate can continue to practice successfully. Tell a judge that an attorney or an advocate is dishonest and that tabel sticks. A sense of doubt may be created in the judicial mind, however unfair that might subsequently prove to be. This kind of conduct cannot be allowed. I express the hope that in making these comments practitioners, particularly in the area of matrimonial disputes, will bear in mind the necessity to keep a proper balance between being officers of the court doing proper duty to their clients.'

[115] I make common cause with the remarks of Davis J. If the appellants were aggrieved with the conduct of the respective legal practitioners, which they clearly are, they have recourse to the Body to whom legal practitioners are accountable, ie. the Namibian Law Society. Launching a personal attack on legal practitioners who are merely representing their clients and pursuing their mandate is unacceptable.

[116] The judge a *quo* remarked that allowing litigants to sue lawyers personally for representing their clients would imperil the independence of the legal profession and the particular lawyer. His reasoning in this regard is also sound when he states as follows:

> '[58] Where litigants are allowed to sue lawyers personally for representing their clients or as a result of doing so, the independence of the legal profession and of the particular lawyer is imperilled. Lawyers should not sit in consultation with a client, trembling as a result of them apprehending that they may be personally sued for representing their client properly, diligently and fearlessly. This phenomenon is one that we can ill-afford in this jurisdiction as it fundamentally affects the right 'to be defended by a legal practitioner of their choice'.[23] It should not be allowed to take root, let alone to bear fruit. It must simply be nipped in the bud.'

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[23] Article 12(*e*) of the Namibian Constitution.

[117] In my opinion, these attacks on the respondents' legal practitioner of record are unjustified, scurrilous, and wholly unacceptable in this jurisdiction. In appropriate cases, the court may need to use punitive costs to show its disapproval of harmful practices. This warning applies to all litigants, whether they are represented or not.

<u>Condonation application</u>

[118] The appellants sought condonation for several non-compliances, as it appears from the papers before me. The ninth to eleventh respondents did not oppose the application for condonation and indicated that they would abide by this court's decision in this regard. One of these non-compliances was the late filing of the appeal record.

[119] In support of their application for condonation, Mr Beukes explained that the appeal record was due to be filed in mid-2021 when everybody was still on high alert regarding the devastating effects of the COVID-19 pandemic. During this time, there was a spike in COVID cases, and the appellants, 72 years of age at the time, fell in the high-risk category of persons who may fatally contract COVID-19 and were limited in their movement to prepare and file the record timeously.

[120] Mr Beukes contended that the respondents could not be prejudiced by the late filing of the appeal record as the notice of appeal was served on time, and the respondents were thus aware of the pending appeal. He further contended that the appellants had good prospects of success in their appeal and, in support of this contention, referred the court to the notice of appeal and facts set out therein.

[121] This court condoned the late filing of the appeal record and reinstated the appeal. We decided on the condonation application with respect to the late filing of the appeal record against the backdrop of this matter and the time that elapsed since the commencement of this matter, which dates back to early 2000. This court cannot yet again strike this matter due to non-compliance.

[122] Further, in light of the respondents' non-opposition on any procedural issues, it is in the interest of all the parties before the court to consider the merits of the appeal and to pronounce itself on a matter that has strung along the parties for 20 years.

Costs

[123] The final issue to consider is costs. The appellants are not represented in this appeal, although the second appellant was previously represented on the instructions of the Directorate of Legal Aid. Thus, there is no reason to shield the appellants from a cost order in this appeal, and there is no basis for deviating from the normal rule that the costs should follow the result.

Order

[124] In the result:

1. The appeal is dismissed with costs.

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PRINSLOO AJA

____

MAKARAU AJA

____

SCHIMMING-CHASE AJA

APPEARANCES

APPELLANTS:	In Person
9th and 11th RESPONDENTS:	T Phatela On instructions of Dr Weder, Kauta & Hoveka Windhoek