REPORTABLE

CASE NO. SA : 22/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ALEX MABUKU KAMWI **APPELLANT**

And

HANNELIE DUVENHAGE **FIRST RESPONDENT**

ETZOLD-DUVENHAGE LEGAL PRACTITIONERS **SECOND RESPONDENT**

CORAM: Maritz, JA, Chomba, AJA, et Damaseb, AJA

Heard on: 2008/10/28

Delivered on 2008/11/24

APPEAL JUDGMENT

CHOMBA, A.J.A.

[1] On 6 July 2007 the appellant, whom I shall henceforth refer to as the applicant, presented an application for default judgment to be heard in the High Court before Heathcote, AJ. The history of the matter is that the applicant

instituted an action by combined summons whereby he claimed against the defendants, who are now the respondents to this appeal, a gross amount of a little more than N$580, 000 plus interest and costs. The defendants were also the respondents to the application for the default judgment and, because this appeal is the sequel to that application, I shall continue referring to them as respondents throughout this judgment. They filed an exception to the claim, but that exception was struck off for reasons not relevant hereto. According to the applicant's impression, the respondents were expected to file a fresh exception, but the respondents' legal representative informed the applicant that the respondents were not prepared to do so. Thereupon the applicant purported to bar them from participating further in the proceedings.

[2] Therefore when the applicant applied for default judgment and, consequentially, a set down for the hearing of that application, he did not think that it was necessary to give notice to the respondents. The application was purportedly made under Rule 31(4) of the High Court Rules. The lack of notice notwithstanding, Ms Gabers-Kirsten attended the default judgment application proceedings as legal representative of the respondents, but she expressed surprise to see the matter on the roll of the day. The applicant, who was appearing in person, explained that after he had filed what he called the "notice of bar" he did not think that they were entitled to participate further in the proceedings. He, therefore, questioned the propriety of the respondents being represented in the proceedings.

[3] During the hearing which ensued, the presiding Judge and the applicant engaged in a short dialogue concerning circumstances touching on the default application. Thereafter, in an extempore judgment, the Judge made what he termed an order, but that order was in the nature of a ruling. In it he stated that he accepted, without so deciding, that the defendants – referring to the respondents as they were named in the combined summons – were barred from filing a plea, but he queried the fact that the amounts as claimed in the particulars of claim were different from those in the application for default judgment. Having summarised the details in the particulars of claim, which he called "a conglomerate of unhappiness" on the part of the applicant, he concluded that there was no cause of action disclosed and then dismissed the action with costs.

[4] Those were the circumstances which gave rise to this appeal. When the appeal came before us for hearing, the applicant still appeared in person, while advocate Schickerling represented the respondents. It is apposite to mention at this stage that the heads of argument on behalf of the respondents were filed and received by us only on the very day of the hearing. Advocate Schickerling was most apologetic about this and applied for condonation. However, he assured us that a copy of those heads was served on the applicant on or about 27 September 2008. The applicant disputed that date, although he said that when service of the heads was effected at his office he was not present. He claimed to have seen the heads on 2 October 2008.

[5] In his heads of argument advocate Schickerling raised three points *in limine* relating to the following matters, namely the late filing of the record of appeal, the

incompleteness of the said record and thirdly failure to furnish security for the respondents' costs of the appeal. Moreover and as regards the incompleteness of the record, on the 14th October, a fortnight before the hearing date, this court caused a letter to be addressed to the applicant and it read in part as follows:

> "Their Lordships, the Judges who will preside on the appeal have remarked as follows:
>
> > 'The record of appeal seems to be significantly and substantially incomplete. Kindly advise the appellant that he is required to file heads of argument by no later than noon on the 22 October 2008 why the appeal should not be struck from the roll with costs due to non-compliance with the provisions of Rule 5(5) of the Rules of the Supreme Court.'"

[6] In the light of the foregoing, we, at the outset, indicated to the parties hereto that we would reserve our decision on adv. Schickerling's condonation application, would not entertain arguments on the merits of the appeal, but would only hear arguments on the preliminary points. This judgment is, therefore, concerned with, and is based on, the submissions we heard, and it is inclusive of our decision on the condonation application on behalf of the respondents.

Points *in limine.*

Incompleteness of the Record of Appeal

[7] The record of appeal *in casu* consists of two volumes. One is headed "Records" and it comprises an index with only one item in it, namely "records of court." Inside the volume itself are minutes of the proceedings in the court *a quo* and then the transcriber's certificate. The second volume is headed "Appeal" and

contains the following documents: the notice of appeal, the notice to oppose the appeal, and these are followed by two orders signed by the Registrar of the High Court on 19 February 2007 and 6 July 2007 respectively. The first order states that the matter was struck off the roll while the second is about the dismissal of "the action" with costs. On the face of it, the earlier order would appear to relate to the striking off of the exception and the latter is the order impugned in this appeal.

[8] Rule 5(13) of the rules of the Supreme Court is couched in the following terms:

> "5. (13) The copies of the record shall include the reasons given by the judges appealed from and shall contain a correct and complete index of the evidence and of all the documents and exhibits in the case, the nature of the exhibits being briefly stated in the index."

[9] Before discussing the non-compliance with the above-mentioned sub-rule, it is necessary to also refer to sub-rule (16) of the same Rule 5. It reads as hereunder set out -

> "(16) The registrar may refuse to accept copies of records which do not in his or her opinion comply with the provisions of this rule."

[10] I shall comment later on the relevance of sub-rule (16). For now, I revert to the point regarding the incompleteness of the record. The contents of the record filed by the applicant have been reproduced in paragraph [7] above. It is patent that when those contents are tested against the requirements of sub-rule (13) of

Rule 5, the record is indeed scanty and incomplete. The absence of the combined summons and the pleadings is conspicuous. The notice of bar and the application for default judgment were also not included. All those documents were essential for scrutiny by this Court. As if the failure to include those documents in the record of appeal was not bad enough, the applicant purported to file the combined summons and the particulars of claim as attachments to an affidavit which was itself an attachment to the heads of argument. Moreover, the inclusion of an unsolicited affidavit as an attachment to heads of argument is simply unheard of. The presentation of the record of appeal was an utter fiasco, quite apart from the record being incomplete.

[11] The non-inclusion of vital documents in a record of appeal makes an appellate court's work as difficult as it is to build a house where there is no foundation. In this case the action as presented in the court below did not run the full course: the parties did not present the totality of their cases; and there was no judgment on the merits. Therefore, the documentation necessary for compiling a record of appeal was minimal. For that reason a record consisting of one volume only would have sufficed. An appellate court's duty is to do justice between the parties. That duty can only be satisfactorily accomplished after the parties have comprehensively presented their arguments. To ably present comprehensive arguments each party needs a complete record, except that under sub-rule 5(5)(i) or 5(5)(ii) the parties may by mutual consent dispense either with the whole or part of the record.

[12] It is important for a respondent to an appeal to be furnished with the fullest information possible for the additional reason that he or she should be aware of the case he or she will be required to challenge at the hearing of the appeal. Unless he or she is in possession of such information he or she will be handicapped and prejudiced in preparing himself or herself for the task of opposing the appeal. The need for a full and complete record is even greater where the legal practitioner who is going to represent a respondent is not the same as the one who appeared for the respondent at the trial court, as was the position in the present case. It was, therefore no wonder that adv. Schickerling complained during the proceedings before us that his clients were prejudiced by the applicant's failure to file a complete record. The Court agrees with him.

[13] Filing of incomplete records of appeal can attract serious consequences against the defaulting party. In the *Ministry of Regional and Local Government and Housing v Muyunda* 2005 NR 107*,* Damaseb, P, agreed with counsel for the respondent who submitted (the other party conceding) that where there is non-compliance with the rule of court which requires the filing of a complete record, an appeal should be struck off the roll. I would also agree, but as in the present case this is not the end of the matter, I defer my final view.

[14] Before discussing the second point, let me briefly revert to sub-rule (16) of Rule 5. When applied, that sub-rule can play a pivotal role in the process leading to the hearing of appeals in this Court. It empowers our registrar by giving him or her a discretion to refuse to accept copies of records which do not in his or her opinion comply with the provisions of Rule 5. Had the registrar invoked this rule

when the so-called “appeal” was filed, the position in which the Court was placed of not being able to hear the appeal on the merits would have been avoided.

Late filing of the record of appeal

[15] Sub-rule (5) of Rule 5 states as follows –

> “5(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions by the Chief Justice –
>
> (a)…
>
> (b) in all other cases within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required,
>
> within three months after granting such leave;
>
> (c) within such further period as may be agreed to in writing by the respondent;
>
> lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary.”

There is a proviso to the sub-rule, but because it is irrelevant to the matter at hand there is no need to reproduce it.

[16] The order dismissing the applicant’s default judgment application in this case was made on 6 July 2007. In terms of the requirement in Rule 5(5)(b), *supra,* that was the date from which the three month period started to run. On July 20 the

notice of appeal was filed, but the record of appeal was filed piecemeal as follows – the volume entitled “Appeal” on 29 April 2008 and that entitled “Records” on 14 August 2008. The latter date, 14 August 2008, is the day of reckoning as the lodgement date in this case because the volume lodged on the earlier date, consisting, in substance, of only the notice of appeal, the notice to oppose the appeal, followed by the two orders earlier mentioned, cannot pass as a record at all. If Rule 5(5) was complied with, the record should have been lodged on 5 October 2007, as that was the deadline. That means, therefore, that the record in this case was lodged more than 12 months after the date of the impugned order, or nine months out of time.

[17] In answer to the complaint by adv. Schickerling that the record was lodged out of time, the applicant gave no explanation. However, applicant's explanation may be gleaned from his response to the letter which, as stated earlier, was addressed to him on the Court's direction. In the response he recapitulated that the judgment he was impugning was delivered on 6 July 2007; and that he noted his appeal on 20 July. He then lodged the bundle titled "Appeal" on 24 April 2008. Such lodgement, he argued, was never a delayed one because he noted the appeal within the prescribed period. Furthermore, he explained that the delay was occasioned by the record transcriber. In the light of these circumstances, he contended, the delay having been caused by a third party should not attract a sanction against him since, according to him it was a technical delay. In the event, he concluded, that the Court should condone such delay.

[18] If I heard him correctly during the appeal proceedings, the applicant asked that the Court should adjourn the appeal *sine die* and award the wasted costs to the respondents. He further submitted, as far as I could gather, that in the circumstances prevailing, the Court may, *mero motu,* condone the non-compliance with the relevant rule. On the other hand, adv. Schickerling prayed that the appeal should be struck off the roll. As is implicit from his above-mentioned arguments, the applicant has not made any formal written, let alone any informal oral, application to the Court for condonation.

[19] The issue of failure to comply with Rule 5(5), *supra* was considered in the *Chairperson of the Immigration Selection Board v Frank,* 2001 NR 107*.* Strydom, CJ, being faced in that case with the same problem of non-compliance with Rule 5(5) *supra,* dealt with the matter as stated in the following dictum which I now quote from page 164D – E:

> "Discussing the effect of the non-compliance with AD Rule 5(4) of South Africa, which is in all material respects similar to our Rule 5(5), Vivier JA in the case of *Court v Standard Bank of SA Ltd; Court v Bester NO and Others 1995 (3) SA 123 (A)* at 139F-I came to the conclusion that such failure results in the appeal lapsing and that it was necessary to apply for condonation to revive it. This in my opinion is also the effect of a failure to comply with Supreme Court Rule 5(5)." (Underling supplied)

[20] In *Channel Life Namibia (Pty) Ltd v Gudrun Otto*, Case No. SA 22/2007 (unreported) delivered in the Supreme Court on 15 August 2008, the same issue of breach of sub-rule 5(5) fell for determination by this Court. Counsel for

respondent, Mr. Coleman, submitted to the effect that non-compliance with that sub-rule had the same consequence as failure to comply with sub-rule 5(6)(b). The effect of the latter sub-rule is that if an appellant fails to timeously lodge a record of appeal and has not within the prescribed period applied to the respondent or his or her legal representative for consent to extend the prescribed period and further fails to inform the registrar of having made such application, then the appeal shall be deemed to have been withdrawn. That result, Mr. Coleman argued, meant that the appeal goes out of the Court's hands. In other words the appeal, according to Mr. Coleman's submission, becomes irredeemably withdrawn from the Court.

[21] After reviewing relevant South African Court decisions based on counterpart procedural rules, Strydom, AJA, came to the conclusion that Namibian Rules 5(5) and 5(6)(b) were modelled on the same lines as their counterpart South African rules. Accordingly he held that Namibian Rules 5(5) and 5(6)(b) should not be given the same interpretation. He then went on (quoting part of paragraphs [37] and [38] of the judgment):

> "[37] I am not persuaded that our Rule (i.e. Rule 5(5)) is amenable to the interpretation contended for by Mr. Coleman. More so as our Rule was clearly modelled on the South African Rule and at the time the interpretation given to that Rule was clear.
>
> [38] If Mr. Coleman's interpretation of the Rule is accepted it would mean that an appellant may be non-suited without him having been amiss in any way and solely because of the neglect or inadvertence of his legal practitioner, and no matter how deserving his case may be, the Court would stand by helplessly to come to his relief. In my opinion it could never have been the intention to close the doors of

> the Court on an appellant under circumstances over which the Court has no control. To do so would amount to an abdication of the Court's powers to regulate its own affairs and would further also amount to the Court divesting itself of its own jurisdiction, something which, in my opinion, the Court cannot do."

[22] Stressing that sub-rule 5(6)(b) applied only in order to regulate the period within which a cross-appeal was to be prosecuted, he stated that breach of sub-rule 5(5), on the other hand, had a different consequence. He then concluded in paragraph [39] by stating:

> "In such an instance (i.e. breach of sub-rule 5(5)) the appeal is deemed to have lapsed and may be struck from the roll. However, an application for condonation may be brought in terms of Rule 18 and, on good cause shown, the failure to comply with the Rules may be condoned and the appeal be re-instated."

[23] The effect of Strydom's foregoing dictum is that an application for condonation is a condition precedent to reviving an appeal which has lapsed due to non-compliance with the Rule 5(5) requirement. I must emphasize that in the instant case there is no application for condonation. For that reason the court is loath to exercise its unsolicited discretion to condone the applicant's breaches, especially in the light of the fact that in this case the respondents' legal representative has asked for punitive action to be taken in respect of each of the applicant's breaches. Moreover, it is not the court's duty, but that of the parties, to conduct their respective cases. The Court would be putting itself in an invidious position if it were perceived as being partial by going to the aid of a party who has run foul of the rules of court.

Failure to furnish Security for Costs

[24] It is trite that in the absence of any special court order, the noting of an appeal automatically suspends the execution of the judgment appealed against. (See at page 870 under the rubric '(ii) Execution and security' – *The Civil Practice of the Supreme Court of South Africa,* 14th Ed. by Van Winsen, Cilliers and Loots). In raising this point *in limine,* adv. Schickerling relied on Rule 8 of the rules of this Court, of which sub-rules (2) and (3) provide as hereunder stated –

> "(2) If the execution of a judgment is suspended pending appeal, the appellant shall, before lodging with the registrar copies of the record enter into good and sufficient security for the respondent's costs of appeal, unless –
>
> (a) the respondent waives the right to security within 15 days of receipt of the appellant's notice of appeal; or
>
> (b) the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant's notice of appeal, or such longer period as that court on good cause shown may allow, releases the appellant wholly or partially from that obligation.
>
> (c) …
>
> (3) If the execution of a judgment is suspended pending appeal, the appellant shall, when copies of the record are lodged with the registrar, inform the registrar in writing whether he or she –
>
> (a) has entered into security in terms of this rule; or
>
> (b) has been released from the obligation, either by virtue of waiver by the respondent or release by the court appealed from, as contemplated in sub-rule (2),

> and failure to inform the registrar accordingly within the period referred to in rule 5(5) shall be deemed to be a failure to comply with the provisions of that rule."

[25] The only response the applicant made to this point was that he was not aware of the need to furnish security, adding that the respondents should have, according to him, filed a notice of motion in order to raise the point but that they did not do so. I am not aware of any procedural requirement for a notice of motion in order to raise this, or any other, type of point *in limine.* It was perfectly in order to raise this point in the heads of argument, as the respondents did here.

Conclusion

[26] It will be noted that sub-rule (3) of Rule 8, *supra,* provides that failure to comply with that sub-rule has the same consequence as non-compliance with Rule 5(5), *supra.* As we have seen when considering the point relating to breach of Rule 5(5), the sanction is the lapsing of the appeal. The overall position is, therefore, that –

(a) breach of the rule requiring the lodging of a correct and complete record of appeal is striking the appeal off the roll.

(b) breach of the rule requiring timely lodgement of the record of appeal is the lapsing of the appeal followed by striking the appeal off the roll.

(c) breach of the Rule requiring an appellant to furnish good and sufficient security for the respondent's costs of the appeal is also the lapsing of the appeal, and similarly striking the appeal off the roll.

The only consolation the appellant has is as stated by Strydom, CJ in *Frank's* case, *supra,* namely to subsequently apply for condonation in order to revive the appeal.

Condonation for late filing of respondents' heads of argument.

[27] As indicated at the outset, adv. Schickerling requested that this Court condone the late filing of the respondents' heads of argument. Again as noted already, in making that request, counsel was most apologetic. What is more is that the heads were served on the applicant well within the period specified in the rules. In terms of Rule 11(2) of the rules of this Court a respondent to an appeal is required to file his or her heads of argument with the registrar and to serve copies of the same on the appellant 10 days before the hearing date. In the current case, even if we were to take the appellant's word that they were served on 2 October 2007, service was effected at least twenty-six days before the hearing date. I am, therefore, satisfied that the applicant suffered no prejudice as might have been the case if the service was effected in breach of the procedural requirements. I think that the request for condonation for the late filing of the respondents' heads of argument falls within the contemplation of Rule 18. The Court accordingly hereby grants condonation in retrospect.

[28] In the final analysis, I hereby order as follows –

1. The appeal is struck off the roll with costs.

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CHOMBA, AJA

I agree.

_____
MARITZ, JA

I also agree.

_____
DAMASEB, AJA

On behalf of the Appellant:	**In person**
Counsel on behalf of the Respondents:	**Adv. J. Schickerling**
Instructed by:	**Kirsten & Co.**