REPORTABLE

CASE NO: SA 36/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RICHARD KATJAIMO	**Appellant**
and	
CLAUDIUS KATJAIMO	**First Respondent**
MONICA KATJAIMO	**Second Respondent**
ANTONIA KATJAIMO	**Third Respondent**
GERHARD KATJAIMO	**Fourth Respondent**
EWALD KATJAIMO	**Fifth Respondent**

Coram: DAMASEB DCJ, MARITZ JA and HOFF AJA

Heard: **3 November 2014**

Delivered: **3 November 2014**

Handed down: **12 December 2014**

APPEAL JUDGMENT (REASONS)

DAMASEB DCJ (MARITZ JA and HOFF AJA concurring):

Introduction

[1] After hearing oral arguments on 3 November 2014, we disposed of this matter by way of an order in the following terms:

‘1. The application for postponement of the application for condonation and reinstatement of the appeal is refused.

2. The application for condonation and reinstatement of the appeal is struck off the roll.

3. The applicant’s instructing legal practitioner pays the costs of the respondents *de bonis propriis*. Such costs to include the costs consequent upon the employment of one instructing and one instructed counsel to be taxed on a scale as between legal practitioner and own client.’

[2] What now follows are the reasons for the order that we made.

[3] The case which is the subject of the present judgment was conceived as an appeal against the whole of the judgment and order delivered by Unengu AJ in the High Court on 15 April 2013. The learned judge made an order dismissing a claim brought by the appellant to evict some of his family members from a farm (the property) of which he claimed in his particulars of claim to be the lawful owner. Unengu AJ came to the conclusion that the defendants against whom the relief was sought *a quo* had acquired a lifelong usufruct in respect of the property and that the appellant had no right to evict the affected family members from it. The appellant is dissatisfied with the outcome of his claim in the High Court and wishes to pursue an appeal in this court. It is the manner in which his instructing practitioner went about prosecuting the appeal that has created difficulties for him.

[4] The notice of appeal was filed on 15 May 2013 and was duly opposed by the respondents on 27 August 2013.

[5] In terms of rule 5(5)*(b)*, an appeal record should be lodged by the appellant within three months of the delivery of the judgment being appealed against. Since judgment was delivered on 15 April 2013, the appeal record should have been lodged on or before 15 July 2013. The record was however only lodged on 2 August 2013.

[6] The appeal was set down by the Registrar by notice of set down dated 15 May 2014, to be heard on 3 November 2014, with heads of argument by the appellant due on 3 October 2014. The appellant's heads of argument were indeed filed on the date they were due.

[7] In the case before court there is no cross-appeal and therefore the provisions of rule 5(6)*(b)* do not apply. The applicable provision is rule 5(5) which states in relevant part as follows:

> '(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice -
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> (a) in cases where the order appealed against was given on an exception or an application to strike out, within six weeks after the date of the said order or, in cases where leave is required, within six weeks after the date of an order granting leave to appeal;
>
> (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 an order 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.' (My underlining.)

[8] This court stated in *Ondjava Construction CC and Others v HAW Retailers t/a Ark Trading*[1] as follows in respect of rule 5(5)*(b)*:

> '. . . As noted in numerous judgments dealing with provisions in other jurisdictions worded similarly to rule 5(5), although they may not specifically so state, their language implies that an appeal lapses upon non-compliance with their provisions. This, in essence, is also the construction given by this court to the subrule. The effects thereof are that the appeal is deemed to be discontinued and that it may only be revived upon the appellant applying for – and the court granting – condonation for the non-compliance and reinstatement of the appeal . . .'

The present appeal had therefore lapsed by the operation and application of rule 5(5)*(b)*; yet, as will soon become apparent, the appellant failed to promptly and without delay seek condonation for his non-compliance and for the appeal's reinstatement and, when he eventually lodged the appeal record, failed to include the transcription of a vital part of the evidence adduced at the trial

[9] On 3 September 2013 the appellant filed of record an application seeking condonation for the late filing of the appeal record and for the reinstatement of the appeal. That application is supported by affidavits deposed to by his instructing legal practitioner and others who, in one way or another, were involved in securing the record. The application was not opposed. On 15 October 2014 the appellant

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[1] 2010 (1) NR 286 (SC) at 288C.

filed an application 'for the postponement of the appeal'. This application was duly opposed by the respondents. The appellant's instructing legal practitioner, Mr Kaitjata Kanguuehi, deposed to the affidavit in support of the postponement application while Mr Dirk Conradie acting for the respondents deposed to the affidavit in opposition thereto.

[10] During argument on 3 November 2014, Mr Denk for the appellant conceded the court's proposition to the parties that in view of the lapsing of the appeal, there was no appeal pending before court that could be the subject matter of a postponement and that all there was before court was the application for condonation and reinstatement of the appeal. Mr Denk thereupon moved that the court approach the 'postponement application' on the basis that it was an application for the postponement of the condonation and reinstatement application. The effect of this concession is threefold:

(a) there is no appeal pending before court;

(b) since there is no appeal pending before court, an application for its postponement is inept; and

(c) the only matter that fell for the court's consideration was whether or not the condonation and reinstatement application should be heard.

[11] The net result of all this drama was that the only conceivable relief that the appellant could obtain from the court at this juncture was the postponement of the application for condonation and reinstatement of the appeal, to enable the record to be put together so as to be complete.

[12] The latter was however compounded by yet another important concession made by Mr Denk: that he was not ready to argue that application as the missing parts of the record which had in the first place necessitated the appellant to seek a postponement had not yet been provided to him by the instructing legal practitioner. Obviously, the court could not adjudicate a condonation and reinstatement application on an incomplete record as such an inquiry of necessity involves consideration of the prospects of success. This may all sound convoluted but is the result of the appellant's practitioner of record's negligence as I will soon demonstrate. The reason that the appellant finds himself in this dilemma is the fact that the record was not filed on time and that, when it was eventually filed, it was incomplete in that a substantial section of the record was missing. But how did that come about?

Explanations offered in the postponement application

[13] In this judgment, I confine my comments to the allegations made in support of the postponement application in the event that the appellant decides to still pursue the application for condonation and reinstatement of the appeal based on his affidavit in support thereof. Suffice it to state at this stage that both the purported postponement application and the one for condonation and reinstatement were necessary on the basis that the appeal record was not

complete. The appellant's legal practitioner who was and remains charged with the conduct of the appeal is Mr Kaitjata Kangueehi. In this affidavit filed of record on 15 October 2014, he states that in the event that the court elects to proceed with the hearing, the applicant would suffer 'severe and enduring prejudice' in the absence of the complete record.

[14] Mr Kanguuehi further deposed that the appeal record was transcribed by and bound by Tunga Holdings (Pty) Ltd (Tunga), the transcription company, on or around 3 September 2013 and that the record sent to him consisted of eight (8) volumes. The eight (8) volumes were then filed with the court and the respondents. According to Mr Kangueehi, it was when instructed counsel, Mr Denk, set about preparing the heads of argument that it became apparent that the evidence of the appellant was missing from the record. The telling admission implied here is that when he received the record from Tunga in September 2013, Mr Kanguuehi did not take the trouble to read the record and to satisfy himself that it was complete.

[15] According to Mr Kangueehi, when the problem was identified, a Ms Virginia O'Malley, a legal practitioner in his firm, sent an email on 12 and 13 October 2014 to Tunga to inform them of the incomplete record and requested them to remedy the situation. Mr Kangueehi deposes that on 13 October 2014 he made contact with Mr Conradie, acting for the respondents, and informed him of the problem with the record and sought his agreement for a postponement. Mr Conradie promised to revert but never did. Mr Kangueehi further states that Tunga accepted responsibility for the incomplete state of the record and that by the date of

preparation of the interlocutory application for postponement the missing parts of the record had not yet been furnished by Tunga. Mr Kangueehi also records that although the appellant already filed its heads of argument on 3 October 2014, the appeal record was incomplete and will remain so incomplete until duly rectified by the transcribers. The reference to the heads of argument is the set of legal submissions filed of record on behalf of the appellant on 3 October 2014 in which instructed counsel deals with (a) the application for condonation and (b) the merits of the appeal. The glaring anomaly is that instructed counsel was able to settle heads of argument without the benefit of the missing parts of the record which, crucially, related to the appellant's evidence – in circumstances where he bore the onus in regard to his claim of ownership and possession of the property by the respondents.

Respondents' opposition to the postponement application

[16] Mr Conradie who is the respondents' legal practitioner of record deposed to the affidavit in opposition to the postponement application. He alleges therein that:

(a) there is no appeal pending before court as the appeal is deemed to have been withdrawn;

(b) the appellant was remiss in that he could have avoided the withdrawal of his appeal by simply applying to the respondent for extension and alerted the registrar as contemplated in rule 5(6)*(b)*;

(c) the appellant received the record on 3 September 2013 and took over 13 months to realise that the record was incomplete;

(d) the postponement application was brought only on 14 October 2014 while it is alleged that the fact of the missing part of the record was identified on 3 October 2014; and

(e) that the inordinate delay in identifying the problem with the record had not been fully explained.

[17] Mr Conradie states further that it was incumbent upon Mr Kangueehi upon receiving the record from Tunga to verify its accuracy and completeness rather than, as he describes it, 'shelving the records and simply waiting for the allocation [of] a hearing date'. Mr Conradie criticises in particular the fact that the application for postponement was now being sought a year after the fact of the incomplete record became known; and more so that the missing part of the record related to the evidence of the appellant. Mr Conradie also levels criticism at the fact that the appellant's instructed counsel, with full knowledge of the missing part of the record, prepared heads of argument in the matter.

Common cause facts

[18] It is common cause that the three month period had lapsed without the record being lodged and that the appellant did not obtain the respondents' consent for an extension. The remissness of the legal practitioner of the appellant is accentuated by the failure on his part to ensure that the record was complete, and

the fact that he failed to take appropriate steps to have the record completed and filed in time in order to comply with the rules. Although the appellant's legal practitioner could have obtained the requisite consent from the respondents for the extension of the time period within which the appeal was to be prosecuted, he also failed to do so. What stands out most prominently is the fact that the instructing legal practitioner did not consider it his duty to check if the record received from Tunga was complete and simply passed it on to instructed counsel. As I will soon show, that is a dereliction of duty which this court has in the past cautioned that it will visit with a punitive costs order in an appropriate case.

The parties' submissions

[19] During argument Mr Denk stressed that the appellant was not personally responsible for the mistakes made by his instructing legal practitioner and that he had always evinced a strong intention to prosecute the appeal. Yet Mr Denk made important concessions that further highlight the negligent conduct of the appellant's instructing legal practitioner. Mr Denk admitted that even as of 3 November 2014, he had himself not received a copy of the missing parts of the record although he had been informed that it was received by his instructing legal practitioner on the Friday preceding the appeal hearing, and so was unable to assure the court that the record was now complete. Mr Denk also conceded that a *de bonis propriis* costs order against the instructing legal practitioner for the appellant would be justified in view of Mr Kangueehi's obvious and inexplicable negligence.

[20] Mr Rukoro, on behalf of the respondents, emphasised that it is apparent from the record that it took appellant's legal practitioner of record thirteen months to realise that the record was incomplete (despite the fact that it was the appellant's own version of the evidence that was missing from the record). Counsel for the respondents also noted that despite being given a hearing date of 3 November 2014, Mr Kangueehi did not contact Tunga until 12 October 2014 regarding the missing parts of the record (even though the fact of the incomplete record must have been obvious whilst preparing the heads of argument, due on 3 October 2014). Mr Rukoro further highlighted that only on 14 October 2014 did the appellant file a notice seeking postponement due to the incompleteness of the record. Mr Rukoro conceded that there was not much prejudice the respondents would suffer if a punitive costs order was made in the respondents' favour to indemnify them against the costs incurred in opposing the appeal and the related interlocutory applications.

The relevant case law

[21] Strydom AJA in *Channel Life Namibia (Pty) Ltd v Otto*[2] lamented the problems that have been caused by delays and non-compliance with the rules of this court when he said:

> '[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. It further seems

[2] 2008 (2) NR 432 (SC) paras 47 - 48.

> that it has become the practice of legal practitioners to leave the compilation of the record entirely in the hands of the recording company. That, however, does not relieve an appellant, who is responsible for the preparing of the appeal record, from ensuring that the record is complete and complying with the rules of this court.
>
> [48] The past session again saw five to six records which were not complete. This is an inconvenience to judges who must prepare for the coming session and further places a burden on the staff of the court to get practitioners to rectify the failures. All this add to the costs of appeal and the time is fast approaching where the court will have to either refuse to hear such matters or order the legal practitioner responsible to pay the unnecessary costs occasioned by his or her failure.' (My underlining for emphasis.)

[22] This warning was echoed by none other than the Chief Justice recently in *Shilongo v Church Council of the Evangelical Lutheran Church,*[3] when he observed as follows:

> 'Virtually every appeal that I was involved in during the recent session of the court was preceded by an application for condonation for the failure to comply with one or other rule of the rules of court. In all those appeal matters, valuable time and resources were spent on arguing preliminary issues relating to condonation instead of dealing with the merits of the appeals. In spite of observations in the past that the court views the disregard of the rules in a serious light, the situation continues unabated and the attitude of some legal practitioners appears to be that it is all well as long as an application for condonation is made. Such an attitude is unhelpful and is to be deprecated.'

The learned Chief Justice added (para 6):

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[3] 2014 (1) NR 166 (SC) at 169, para 5.

> '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.'

[23] In *Channel Life Namibia* it was discovered five weeks before the appeal was due to be heard that the record (which had previously been filed) failed to include the documentary exhibits handed in at trial. The explanation given for this was that the office file did not contain these documents and the individual who attended to the filing of the record was not involved in the matter. In respect of this error, the court noted[4] that 'a little diligence would have discovered that the record was not complete and that steps should have been taken, at a much earlier stage, to locate the documents and file them as part of the record'.

[24] Strydom AJA then set out[5] the duties of a legal practitioner in connection with an appeal record:

> 'In regard to the record of appeal, practitioners must check the record to ensure –
>
> (i) that there are no pages missing from the record;
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> (ii) that all the relevant documentary exhibits are before the court;
>
> (iii) that there are no unnecessary documents included in the record, such as heads of argument used in the court *a quo* and arguments raised in that court, unless such heads of argument are relevant to some or other aspect of the appeal, e.g. to show a concession made by the opposite party;

[4] Para 43.
[5] Para 48.

(iv) that the record complies in every respect with the provisions of rule 5(8), (9), (10), (11), (12), (13) and (14) of the Rules of the Supreme Court.'

[25] *Arangies t/a Auto Tech v Quick Build*[6] bears several similarities to the matter presently before the court. In that case, the record had also been filed late with the result that the appeal had lapsed. The appellant in that case similarly maintained that he should not be penalised for the delays caused by the inaction of his legal representative. O'Regan AJA who wrote the judgment for the court affirmed[7] the approach to applications for condonation as set out in *Beukes and Another v South West Africa Building Society (SWABOU) and Others*[8] *as follows:*

> 'An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. The jurisprudence of both the Republic of Namibia and South Africa indicate that a litigant is required to apply for condonation and to comply with the Rules as soon as he or she realises there has been a failure to comply.'

[26] In the case before the court, the record was due to be filed on 15 July 2013 and as of 3 November 2014 instructed counsel for the appellant was unable to assure the court that the record was complete. By comparison, in *S v S*[9] the court found that a delay of two and a half months warranted a refusal of condonation in light of the fact that the explanation for the delay was insufficient.

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[6] 2014 (1) NR 187 (SC).

[7] *Channel Life* supra para 4.

[8] (SA 10/2006) [2010] NASC 14 para 12.

[9] 2013 (1) NR 114 (SC).

[27] The case law illustrates that an applicant seeking condonation must offer a clear and cogent explanation as to why the delay has occurred and on what basis postponement for the hearing or the condonation application should be granted.

The law to the facts

[28] Mr Kangueehi's conduct of the appellant's appeal falls short of his duties as a legal practitioner who is instructed to prosecute an appeal in this court in that he failed to promptly seek condonation and reinstatement of the lapsed appeal. Besides, the explanation proffered by Mr Kangueehi is weak and unpersuasive. At no point did Mr Kangueehi state in his affidavits that he was aware of his duty as the instructing legal practitioner to peruse and verify the appeal record, or that he did in fact peruse and verify the record before filing it with the court. What was observed in *Arangies t/a Auto Tech*[10] is therefore apposite:

> 'The absence of any sense of diligence or attention to compliance with the Court's rules renders the explanation for the delay in filing the court record weak and unpersuasive.'

[29] The rationale of requiring an applicant to furnish a persuasive explanation is obvious: the postponement of matters comes at a significant financial cost to litigants and prevents them from having their disputes adjudicated and determined in a timely manner. When postponements are granted for which there is no reasonable explanation, it undermines public confidence in the administration of justice.

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[10] Para 8B.

[30] In considering the events that have led to the application for postponement, it is clear that the instructing legal practitioner for the appellant was grossly negligent. Firstly, as described above, he was initially late in filing the record, which had the effect of causing the appeal to lapse. Secondly, it took the appellant's instructing legal practitioner thirteen months to realise that the record was incomplete (despite the fact that it was the appellant's own version of the evidence that was missing from the record). Thirdly, despite having been allocated a hearing date of 3 November 2014, Mr Kangueehi did not contact Tunga until 12 October 2014 regarding the missing parts of the record (even though the fact of the incomplete record must have been identified during the preparing of the heads of argument, due on 3 October 2014). Fourthly, only on 14 October 2014 did the applicant file a notice seeking postponement due to the incompleteness of the record. A litigant is bound to comply with the rules as soon as he or she realises that there has been a failure to comply, yet no explanation has been provided by the applicant for this particular delay. Fifthly, even after he had obtained the missing part of the record from the transcription services, he failed to brief instructed counsel with a copy thereof before the commencement of the hearing.

[31] The admitted remissness of Mr Kangueehi is particularly serious because it suggests that he did not apply his mind to the requirements of the rules of this court. Legal practitioners should not take it for granted that the court will grant applications for postponement and condonation as a matter of course. The fate of such an application is in the discretion of the court, and a condonation application will, amongst others, only be granted when a cogent and persuasive explanation

has been furnished. To take a relaxed approach to these matters is to do one's client a great disservice.

The appropriate relief

[32] Despite conceding the negligence of the appellant's instructing legal practitioner, Mr Denk still requested that the court consider granting the postponement of the condonation and reinstatement application on the basis that the client should not be punished for his legal representative's failures. The problem with this avenue is that there was no appeal pending before court that could be postponed and it was equally impossible for the court to consider the condonation and reinstatement application on an incomplete record.

[33] Given that there was no appeal pending before court that could be postponed, and given that Mr Denk was unable to argue the condonation and reinstatement application if the postponement application were refused, the most practical and appropriate outcome was for the court to refuse the postponement in the form it was moved from the bar and to strike off the roll the application for condonation and reinstatement of the appeal. That does not debar the appellant from reinstituting the condonation and reinstatement application if so advised, subject to the respondents' right to oppose it.

[34] Sufficient warning has been given by this court that the non-compliance with its rules is hampering the work of the court. The rules of this court, regrettably, are often more honoured in the breach than in the observance. That is intolerable.

The excuse that a practitioner did not understand the rules can no longer be allowed to pass without greater scrutiny. The time is fast approaching when this court will shut the door to a litigant for the unreasonable non-observance of the rules by his or her legal practitioner. After all, such a litigant may not be without recourse as he or she could in appropriate instances be able to institute a damages claim against the errant legal practitioner for their negligence under the Acquilian action. I wish to repeat what was said by O'Regan AJA in *Arangies*:

> 'There are times . . . where this court . . . will not consider the prospects of success in determining the application [for condonation] because the non-compliance with the rules has been "glaring", "flagrant" and "inexcusable." '[11]

[35] We hope that the cautionary observations made in this judgment will be taken seriously by all legal practitioners who practise in the Supreme Court. A legal practitioner has a duty to read the decided cases that emanate from the courts (both reported and unreported) and not simply grope around in the dark as seems to have become the norm for some legal practitioners if judged by the explanations offered under oath in support of the condonation applications that come before the court.

Costs

[36] Given the unpreparedness and inexcusable delay on the part of the appellant, this is a case in which it is not appropriate for the court to make a costs order on the customary party and party scale. The respondents in this appeal in no way contributed to the scenario as it has unfolded and it would be unjust if they

[11] At 190B para 5.

were not fully indemnified in their costs. Attorney and own client costs are awarded sparingly and only if party and party costs will not adequately indemnify the innocent party in respect of the costs incurred as a result of the opponent's nonfeasance or malfeasance. I am satisfied that in the present case party and party costs would not be an adequate recompense to the respondents for the costs they have incurred in opposing the ill-fated appeal and the related interlocutory applications.

[37] The negligence and remissness of a legal practitioner are only to be visited on the litigant where he or she contributed thereto in some way, was aware of the steps that need to be taken in furtherance of the prompt conduct of the case, or through inaction contributed to the matter stalling and thus impeding the speedy finalisation of a contested matter. The following dictum by Steyn CJ in *Salojee and Another NNO v Minister of Community Development*[12] has been cited with approval by our courts:

> '. . . There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.'

The court also added at 141I that:

> 'A litigant, moreover, who knows, as the applicant did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorneys and then wash his hands of it. If, as here, the

[12] 1965 (2) SA 135 (A) at 141C; cited with approval in, for example, *Leweis v Sampoio* 2000 NR 186 (SC) at 193; *De Villiers v Axis Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) at 57, para 24.

> stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney . . . and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'

[38] The concessions made by Mr Kangueehi in the affidavit in support of the interlocutory applications and those made by Mr Denk during argument demonstrate amply that the present is not a case in which the *Salojee*-threshold for impugning practitioner misconduct can be attributed to the litigant personally. As Botes AJ aptly remarked in *Windhoek Truck and Bakkie CC v Greensquare Investments 106 CC:*[13]

> '. . . Where a legal practitioner is grossly negligent and/or even intentional in the non-observance of the rules and practice of the court, it in such circumstances will be unfair for the client to be burdened with the costs occasioned by their representative's action.'

[39] It was for the above reasons that we made the order recorded in paragraph [1] of these reasons. For greater clarity we modify the order to read better, without changing its essence. The proper order is that:

1. The application for postponement of the application for condonation and reinstatement of the appeal is refused.

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[13] 2011 (1) NR 150 (HC) para 12.

2. The application for condonation and reinstatement of the appeal is struck off the roll.

3. The applicant's instructing legal practitioner is ordered to pay the costs of the respondents, *de bonis propriis*. Such costs to include the costs consequent upon the employment of one instructing and one instructed counsel, to be taxed on a scale as between legal practitioner and own client.

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DAMASEB DCJ

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MARITZ JA

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HOFF AJA

APPEARANCES

APPELLANT:	Mr A H G Denk Instructed by Hengari, Kangueehi & Kavendjii Inc.
ONE to FIFTH RESPONDENTS:	Mr S Rukoro Instructed by Conradie & Damaseb