REPORTABLE

CASE NO: SA 76/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TJEKERO TWEYA	**First Appellant**
JOHN NAUTA	**Second Appellant**
ELSIE SOPHIA CAROLINA BEUKES	**Third Appellant**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**Fourth Appellant**

and

EDUARD PETRUS HERBERT	**First Respondent**
JOHANNES JACOBUS KOEN	**Second Respondent**
WILLIE KOEN	**Third Respondent**

Coram: MAINGA JA, SMUTS JA and HOFF JA
Heard: **08 June 2016**
Delivered: **06 July 2016**

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] There are two sets of two appellants in this appeal. Each set of two appellants is separately represented. Both sets of appellants timeously noted

appeals against a judgment of the High Court awarding damages against them in favour of the first respondent in an aquilian action on 18 September 2014.

[2] The first and second appellants proceeded to prepare and file the record. They filed a record comprising 22 volumes of pleadings and testimony and 7 volumes of exhibits in what was a lengthy trial action. The first and second appellants did so in December 2014 within the required three months period set in rule 5(5).

[3] On 7 April 2016, the Deputy Registrar gave formal notice to the parties' representatives of the appeal being set down for 8 June 2016.

[4] The first and second appellants, represented by Conradie & Damaseb, filed heads of argument running into 68 pages on 9 May 2016. On 18 May 2016, the Government Attorney representing the third and fourth appellants caused a letter dated 17 May 2016 to be served on the other parties and the Registrar of this court. It stated that the Government Attorney's office only received notice of the date of set down on 25 April 2016. Instructed counsel was then informed of the date of hearing. Given his commitments, it was not possible for him to prepare heads of argument timeously. But it was also then pointed out that the record was materially incomplete in that the testimony of the third appellant (the Master of the High Court) and another witness called by her and the fourth appellant was omitted from it. This evidence spanned some 400 pages. Given the

incompleteness of the record, notice was given of an application for postponement of the appeal.

[5] The Deputy Registrar responded to this letter on 19 May 2016 pointing out that any application for postponement should be timeously made and that, according to court records, the notice of the assignment of the hearing date had been signed for on behalf of the Government Attorney on 7 April 2016. On 19 May 2016, the legal practitioner for the respondents also responded by stating that a postponement application would be opposed.

[6] On 23 May 2016, heads of argument on behalf of the respondents were filed in which the point was squarely taken that the record was substantially incomplete and that, as a result, the appeal had lapsed and should be struck from the roll with costs. The point was also taken that the third appellant – who had been sued in her personal capacity as well as her official capacity as Master of the High Court – had not provided security and that her appeal had also lapsed for that reason as well.

[7] The third and fourth appellants thereafter on 27 May 2016 launched an application seeking the following relief (referring to themselves as first and second applicants respectively):

> ‘1. Condoning the 1st and 2nd applicants’ failure to file heads of argument timeously or at all.

2. Condoning the 1st and 2nd applicants' failure to serve and file a complete record of appeal and granting the 1st and 2nd applicants leave to supplement and rectify the current appeal record.

3. Further and in the event of it being necessary, condoning the 2nd applicants' failure to provide and furnish security as contemplated in rule 8 of the Supreme Court Rules.

4. Reinstatement of the 1st and 2nd applicants' appeal.

5. Granting a postponement of the appeal hearing of the above matter set down for hearing on 8 June 2016 to a date to be determined by the honourable Chief Justice of the above Honourable Curt.

6. Directing and ordering the applicants to pay the wasted costs occasioned by this application as well as the postponement of the appeal, such costs to include the costs of one instructed and one instructing counsel.'

[8] For the sake of clarity, the parties are referred to as appellants and respondents in the appeal.

[9] Mr Khupe of the Government Attorney's office filed an affidavit in support of the application. He stated that Conradie & Damaseb, legal practitioners for the first and second appellants, had undertaken to prepare and file the record. The record was delivered to his office on 18 December 2014, comprising 22 volumes of testimony and 7 volumes of exhibits. Mr Khupe said that he accepted that the record was complete. He stated that he was not involved in the trial from the outset and took over the matter after a substantial part of the hearing had been concluded.

[10] Mr Khupe further stated that the record was misfiled or became lost at the offices of the Government Attorney. He said that he received the Registrar's notification of the date of hearing dated 6 April 2016 on 25 April 2016. He confirmed that he approached the legal representatives of the other parties for a postponement in his letter dated 17 May 2016 already referred to. He further said that counsel informed him of the inadequacy of the record on 17 May 2016.

[11] Mr Khupe said that he thereafter obtained the transcript of the 400 pages of testimony which were missing. No dates are however specified as to when this was requested and obtained. The reason given for the failure to file heads of argument was because 'counsel could not prepare the required heads until such time as the record has been supplemented and rectified'. This despite then being in possession of the missing pages. Mr Khupe then prepared the application which was filed on 27 May 2016.

[12] The missing portions of testimony were in fact only filed on 6 June 2016.

[13] The respondents' legal practitioner, Mr Naude, filed an opposing affidavit to this application. In it, he pointed out with reference to the court file that a messenger in the employ of the Government Attorney, whose identity he had confirmed with that office, had signed for the set down notification from the Registrar on 7 April 2016. He contended that it is the appellants' duty to ensure that a complete record was filed. He pointed out the appeal heading upon the

record only referred to the first and second appellants as appellants without any reference to the third and fourth appellants as appellants. The third and fourth appellants, who had timeously noted their appeal, are instead incorrectly referred to as second and third respondents respectively. This alone, he contended, should have alerted the third and fourth appellants' legal practitioners that the record was inaccurate and needed to be checked.

[14] Mr Naude also pointed out in his opposing affidavit that the first and second appellants had made no application to condone their failure to provide a complete record. He also pointed out that there were other omissions in the record such as the judgment on absolution as well as the third and fourth appellants' notice of appeal. Mr Naude also contended that there were unexplained delays in briefing counsel and bringing the condonation/postponement application. He also said that a significant part of the trial occurred after Mr Khupe had taken over the matter including the evidence of the third appellant and the other witness called on behalf of the third and fourth appellants. He submitted that a cursory glance of the table of contents in the very first volume would have revealed that a large chunk of evidence was missing.

[15] Following Mr Naude's opposing affidavit, the first and second appellant's legal practitioners were spurred into action. On the next day, being the day before the hearing date, they served an application to condone the incomplete record and to reinstate the appeal in the event of it being found to have lapsed.

[16] In the supporting affidavit for this application, Mr Conradie said that he had contracted a concern called Mutago Consulting CC (Mutago) to prepare the record. It was apparent that a running record had been kept by the court transcribers. He further stated that when a copy of the record was obtained from the court file, he and an official of Mutago had not noticed that the evidence of the third appellant and the witness on her behalf as well as their notice of appeal and the notice of cross-appeal were not on the court file. Quite how that official would have known who had given evidence is not explained. Mr Conradie stated that missing portions had not been included in the original record provided by the court transcribers, Tunga Holdings (Pty) Ltd (Tunga). He had also not noticed that these pages were missing when the record was being finalised. The omission, he said, was to be ascribed to 'human error'. He said the error remained unnoticed when instructed counsel had prepared heads of argument and was only realised on 18 May when drawn to his attention by the letter from the Government Attorney.

[17] Mr Conradie further states that on 2 June 2016, he requested a copy of the missing part of the record from Tunga which was bound by Mutago and filed at court on 6 June 2016. He said that his clients did not oppose a postponement of the appeal as sought by the other appellants.

[18] The first and second appellants' application (for condonation and reinstatement) was also opposed by the respondents. Mr Naude again deposed to an affidavit on their behalf which was filed on the morning of the hearing. He pointed out that the application had only been served on his office the day before

the hearing and the missing portion of the record comprising 416 pages the day before that, on 6 June 2016. He also pointed out that there was no reference to any perusal or checking of the record on the part of Mr Conradie. Had there been, he says, that the inadequacy of the record would have been readily apparent. He also pointed out that the entire record had been in the possession of the Registrar of the High Court and of the presiding judge in the High Court.

Parties' submissions

[19] Mr Strydom, who appeared for third and fourth appellants, argued with reference to South African authority[1] that the omission to file a complete record would not give rise to the consequence set out in rule 5(6)(b) of the rules of this court – of an appeal being deemed to being withdrawn. He submitted that this arises when an appellant has failed to lodge a record within the period prescribed. Mr Strydom argued that there was no question of the third and fourth appellants not intending to pursue their appeal. Whilst it may be correct that in these circumstances the appeal may thus not be deemed to be withdrawn, this would not avail the appellants in view of his correct concession contained in his written heads to the effect that an appeal lapses where there has been non-compliance with the peremptory provisions of rule 5(5) as well as rule 8 of the rules of this court. The practical effect is thus the same because an appeal lapses if an

[1] *Rondalia Versekeringskorporasie van SA Bpk v Viljoen en 'n ander* 1976 (3) SA 410 (A) at 420A-C.

appellant fails to lodge a proper record within the prescribed period or within an extended period.[2]

[20] Upon discovery of the lacuna in the record, Mr Strydom argued that the third and fourth appellants' legal practitioners took steps to rectify that and ensure that those portions are bound and brought their application. He conceded that Mr Khupe had been negligent in not perusing the record on its receipt but submitted that this did not amount to recklessness.

[21] Mr Strydom correctly conceded that the court would not be in a position to deliberate upon the prospects of success of the appeal given the material inadequacy of the record, but said that the appeal raised a matter of 'national importance' involving 'questions of trusts'. He contended that the doors of the court should not be closed on his clients and that full recognition should be accorded to their right to a fair trial protected in Art 12 of the Constitution.

[22] Mr Narib appeared for the first and second appellants. He moved their condonation application. He argued that the explanation given for the missing portion of the record – not being on the court file – was reasonable. He said that he had also not picked up that there were portions missing because he expected counsel for third and fourth appellants to deal with their evidence in submissions on their behalf.

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[2] *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) para 7. *Ondjava Construction CC & others v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) para 5.

[23] During his address, Mr Narib conceded that the missing part of the record is material and that the record should have been checked for completeness and that the failure to have done so amounted to negligence.

[24] Mr Tötemeyer, SC on behalf of the respondents, argued that neither of the sets of applicants for condonation had provided a reasonable and proper explanation for the late bringing of their respective applications. He submitted that in the absence of substantial compliance with the requirement to lodge a proper record, the appeal had lapsed. He pointed to contradictions between the two applications for condonation, particularly with reference to securing the binding of the missing portion after that had been discovered. He disputed that Mr Conradie could have checked the court file and the record and stressed that no explanation whatsoever had been provided for this failure. He also submitted that it was incumbent upon the Government Attorney to peruse and check the record and that even a most superficial glance would have invited more scrutiny because their clients were not referred to as appellants but as respondents.

[25] Mr Tötemeyer submitted that the explanations provided by both sets of appellants were so 'glaring, flagrant and inexplicable' that condonation should be refused without the need to consider the merits of the appeal.[3] He also referred to this court's warning in *Katjaimo v Katjaimo and others* 2015 (2) NR 340 (SC) and submitted that it found application in this matter.

[3] With reference to *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

Applicable principles

[26] A recurring theme over the past several years in this court has been repeated failures by practitioners to comply with the rules of this court. This had led to delays in finalising appeals and severely disrupts the administration of justice and the functioning of this court. A common occurrence in the non-compliance with the rules has been the frequent failure to file records on time and also lodging records which are incomplete or fail to comply with the rules. There was emphatic reference to this recurring theme in *Katjaimo* by Damaseb, DCJ:

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

[22] This warning was echoed by none other than the Chief Justice recently in *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia,* 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):

> '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."'

[27] The duties of practitioners in connection with lodging records were amply summarised by Strydom AJA in *Channel Life:*

> 'In regard to the record of appeal, practitioners must check the record to ensure —
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> (i) that there are no pages missing from the record;

(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, eg to show a concession made by the opposite party;

(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.'

[28] This passage was again drawn to the attention of practitioners by Damaseb DCJ in *Katjaimo*.[4] Both of these judgments have been reported. The Deputy Chief Justice directed the following unequivocal admonition to practitioners in *Katjaimo*:

'[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 would 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 inexplicable."

[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

[4] Para 24.

> 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.'[5]

[29] Yet, despite the repeated warnings, the failure to file records in accordance with the rules of this court continues unabated, as is exemplified in this matter.

[30] As was restated by the Deputy Chief Justice in *Katjaimo*,[6] the case law requires applicants seeking condonation and postponement of appeals to provide a clear and cogent explanation for the non-compliance and on what basis a postponement for the hearing or the condonation application should be granted. Furthermore, an application of that nature should be lodged without delay.[7]

Application of principles to the facts

[31] As was correctly conceded by Mr Strydom, non-compliance with rule 5 leads to an appeal lapsing. In this instance there was substantial non-compliance with the requirement of filing a record, given that a material portion had been omitted. The appeal had thus lapsed.

[32] An appeal is thus not before us and cannot be postponed. The relief sought to that end falls to be struck from the roll.

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[5] *Katjaimo* para 34.
[6] *Katjaimo* para 27.
[7] *Arangies* para 5.

[33] The question arises as to whether condonation should be granted for the failure to comply with rule 5 and to file heads of argument (on behalf of third and fourth appellants).

[34] It is well settled that not only should an application for condonation establish a 'full, detailed and accurate'[8] explanation for the non-compliance, but also show reasonable prospects of success in the appeal. The difficulty facing both sets of applicants/appellants is that this court is precluded from determining the question of prospects of success where a material portion of the record is missing (and provided a mere court day before the hearing) and where counsel representing a set of appellants is not in a position to advance argument on the question of prospects of success, not having filed any heads of argument because of the incomplete record.

[35] Mr Tötemeyer confirmed that a running record of the proceedings had been kept. This was also stated in Mr Naude's opposing affidavit. There is no reason why the missing pages could not have been collated and lodged immediately upon the realisation of the inadequacy of the record. That realisation should have occurred when heads were prepared on behalf of the first and second appellants in early May but certainly at the latest on 17 May 2016 when the third and fourth appellants' legal practitioners came to that realisation. Yet the missing portions were only lodged on 6 June 2016 - a court day before the hearing. The explanations tendered by both sets of appellants for this further delay are not only

[8] *Arangies* para 5.

contradictory but hopelessly inadequate. On each version supplied, there are crucial periods entirely unaccounted for.

[36] On Mr Khupe's version, the third and fourth appellants were aware that the record was inadequate on 17 May 2016. Yet the missing part of the record was only filed on 6 June 2016. This, even though the record was transcribed and only needed to be bound. Accepting that Mr Khupe on 25 April only became aware of the date of hearing, it is not explained why counsel's heads could not have been prepared late and condonation sought for that. Counsel had after all represented the same clients throughout the trial. It is also not explained with reference to dates why it took more than 3 weeks after 25 April to realise that the record was incomplete. There is also no reason why the missing portion of the record could not have been bound and supplied on the following day (18 May) or the day after that (19 May) and heads filed shortly afterwards. The failure to do so meant that this court would not be in a position to consider the question of prospects of success.

[37] The explanation tendered by Mr Khupe for the delays in taking steps to file the missing portions of the record – after being challenged directly on the issue – is without any reference to dates and is contradicted by Mr Conradie. Mr Khupe stated that he approached Tunga and was provided with the missing portion of testimony of some 400 pages. No date is provided in respect of his approach to Tunga and the receipt of the missing pages. He then referred to further unspecified enquiries which revealed that Mutago had bound the original record

and would need to bind the missing pages. This he said ‘obviously had now shed a different light on the matter’ and that changes to the record were required. No dates are provided for these steps including when the record was located by him and provided to counsel when the missing pages were obtained and provided to counsel, when he asked for those to be bound and when he established that Tunga would not do so and Mutago would need to be engaged. Some of these steps are in any event contradicted by Mr Conradie who said that he requested the missing portions of the record on 2 June 2016 and that he provided the missing portions (on 6 June 2016). Nor is an explanation provided why counsel could not belatedly prepare heads after receipt of the missing pages. Instead nothing was done about heads of argument despite the centrality to an applicant’s condonation application to address prospects of success on the merits.

[38] Mr Conradie offers no explanation why he only on 2 June 2016 requested the missing part of the record from Tunga. No explanation is tendered why this did not occur immediately upon becoming aware of the inadequacy of the record on 17 or 18 May 2016 at the latest. As I have already made clear, instructed counsel should have picked that up when preparing heads in early May. But even if the record had been provided with appropriate urgency after 18 May and by 20 May 2016, a consideration of the merits may have been possible. But the failure to have taken steps without delay to address the inadequacy record and bring a condonation application without delay on the part of first and second appellants are entirely unexplained.

[39] There was thus a failure by both sets of appellants to take steps without delay to provide the missing portions of the record until the eleventh hour when those portions could easily have been filed two and a half weeks before the hearing. This effectively deprived this court from being able to consider the question of prospects of success.

[40] It is clear to me that both sets of appellants have not met the requisite for condonation of providing 'full, detailed and accurate' explanations covering the entire period of the delay. Nor were their applications brought without delay, particularly in the case of first and second appellants. The explanations themselves, apart from being deficient in detail, are also inadequate, given the contradictions between them. Their inadequacy and the non-compliance in this matter are in the realm of 'glaring, flagrant and inexplicable'.

[41] Mr Strydom's repeated refrain that his clients' Art 12 rights (under the Constitution) would be violated if the court were to shut the door upon his clients does not stand up to scrutiny. His clients' right to a fair trial is to be exercised within the rules of the courts. There is understandably no contention that the rules are unduly onerous or even unreasonable or that they infringe that fundamental right. The respondents' after all have the right to bring a matter to finality. Other litigants' too have the right to have their matters heard with reasonable expedition. Those rights would be undermined if the rules regulating procedure were not adhered to. There is also the debilitating effect which non-compliance with the

rules has on the work of this court, as was again explained by the Deputy Chief Justice in *Katjaimo.*[9]

[42] The last ditch attempts to apply to postpone the applications for condonation and re-instatement from the bar are, given the manifold unsatisfactory features of both applications, undeserving and cannot succeed. In applying *Katjaimo*, the proper course would be to dismiss the applications for condonation and reinstatement.

[43] The frequent warnings of this court concerning the laxity with which appeals are prosecuted spanning several years and recently trenchantly reiterated by the Deputy Chief Justice in *Katjaimo* find application.

[44] This is a matter where the non-compliance with the rules compounded by the inadequate explanations, justifies the dismissal of the condonation applications without considering the prospects of success of the appeal.

[45] It follows that the applications for condonation by both sets of appellants are to be dismissed for this reason.

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[9] Paras 34 and 35.

Costs

[46] Mr Tötemeyer argued that a special costs order is justified. Given the previous warnings given by this court concerning non-compliance with its rules, it would seem to me that a special costs order is warranted.

[47] The third and fourth appellants tendered the respondents' costs. Surprisingly no tender was made by the first and second appellants whose remissness accounts for much of the cause for the defective record. But the third and fourth appellants also bear responsibility for the inadequate record. It should have been checked by their practitioner. Even a fleeting glance at the manifestly incorrect heading on each volume of the record should have triggered further scrutiny. All the appellants are ultimately responsible for the record. They should bear the costs jointly and severally as is set out in the order.

[48] Each of the parties had engaged instructed counsel. The costs order should also reflect that.

Error in the High Court order

[49] In Mr Tötemeyer's heads of argument in the appeal, he points out that a typographical error occurred in a date contained in the rectified order made by the High Court in paragraph 1.2. The date referred to as 5 March 2003 should instead read 5 March 2013.

[50] He invited this court to rectify that error under its powers in s 19 of the Supreme Court Act 15 of 1990. There was no demur to this proposal on behalf of the other parties. We are inclined to do so as is reflected in the order.

Order

[51] The following order is made:

1. The application for postponement of the appeal is struck from the roll with costs.
2. The applications by both sets of appellants for condonation and reinstatement of the appeal are dismissed with costs.
3. The appellants are directed to pay the respondent's costs jointly and severally, the one paying the other to be absolved, on the scale as between legal practitioner and client. These costs are to include the costs of one instructing and one instructed counsel.

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SMUTS JA

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MAINGA JA

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HOFF JA

APPEARANCES

FIRST AND SECOND APPELLANTS:	G Narib Instructed by Conradie & Damaseb
THIRD AND FOURTH APPELLANTS:	J A N Strydom Instructed by The Government Attorney
RESPONDENTS:	R Tötemeyer, SC Instructed by Dr. Weder, Kauta & Hoveka Inc.