REPORTABLE

CASE NO: SA 10/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ERICA BEUKES	**1st APPLICANT**
HEWAT BEUKES	**2nd APPLICANT**

And

SOUTH WEST AFRICA BUILDING SOCIETY (SWABOU)	**1st RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA	**2nd RESPONDENT**
THE REGISTRAR OF DEEDS	**3rd RESPONDENT**
THE DEPUTY SHERIFF OF THE HIGH COURT OF NAMIBIA	**4th RESPONDENT**
JOHN BENADE	**5th RESPONDENT**
LILLY BENADE	**6th RESPONDENT**

Coram:	Chomba, AJA, Mtambanengwe, AJA *et* Langa, AJA.
Heard on:	07/04/2010
Delivered on:	05/11/2010

APPEAL JUDGMENT

LANGA, AJA:

[1] On 07 March 2006 in the High Court of Namibia, Muller J dismissed, with costs, an application in which ERICA BEUKES and HEWAT BEUKES, the 1st and 2nd applicants respectively (the applicants), claimed relief against 6 respondents. The relief sought was for the setting aside of the sale in execution of property on erf 4479, corner Dodge Avenue/Kroon Street, Khomasdal, an order that third respondent reverse the transfer of the aforesaid property and restore its ownership to the applicants, and certain other ancillary relief.[1]

[2] The applicants thereupon lodged an appeal to this Court on 16 March 2006 but failed to lodge the appeal record timeously, as required by rule 5(5)(b) of the Rules of this Court (the Rules).[2] The appeal has, to date not been heard. 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 by this Court 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 and making an order reserving the furnishing of reasons. These are the reasons.

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[1]The full list of the relief sought is as follows: "1. Setting aside the sale in execution of property on erf 4479, Cr Dodge Ave/Kroon Street, Khomasdal; 2. Ordering third respondent to reverse the transfer of the said property and to restore its ownership to applicants; 3. Ordering that 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 (the Act) unconstitutional; 8. Ordering Respondents to pay the costs of this application. 9. Further and/or alternative relief.

[2]Rule 5(5)b which provides, in relevant part, that after an appeal has been noted in a civil case "the appellant shall, subject to any special directions issued by the Chief Justice ... within three months of the date of the judgment or order appealed against ... 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 ..."

[3] Although during argument a number of issues were raised by, in particular, the applicants, they are not addressed in this judgment because of the view I take of this matter that those issues pertain to the substantive appeal and not the application for condonation. Those matters include: (a) an invitation filed by the applicants dated 31 March 2010 to the Minister of Finance to join the proceedings in order to clarify certain issues; (b) a notice of application to intervene by August Maletzky dated 06 April 2010; (c) a notice by applicants dated 08 March 2010 to submit a supplementary affidavit by 1st applicant purportedly alleging new facts that had come to the knowledge of the applicants; (d) a notice, dated 06 April 2010, to apply for the submission of a further affidavit by the 1st applicant on the basis that it contains new facts; (e) a notice of opposition by the respondents to the admission of the supplementary affidavits by the 1st applicant. This judgment deals only with two issues, namely, the manner in which the condonation application was set down and, second, the question whether or not the application for condonation should succeed.

[4] The manner in which the condonation application was set down became an issue following serious complaints and objections by the applicants, alleging improper or irregular conduct on the part of the respondents and the registrar's office. The complaints and objections are contained in written communications directed at the Court and/or the Chief Justice and/or the registrar. Of relevance are: (a) a letter dated 03 April 2008 by the assistant registrar to the applicants and copied to the respondents stating that in terms of rule 5(6)(b) the appeal by the applicants was deemed to have been withdrawn because the period for filing the

appeal record as required by rule 5(5) had elapsed; (b) a response from the applicants addressed to the registrar dated 30 April 2008 taking issue with the assistant registrar's communication and demanding a retraction; (c) a letter by the applicants addressed to the Chief Justice dated 01 May 2008 drawing attention to the assistant registrar's letter and lodging a strong protest against the contents of the letter; (d) a letter by the registrar dated 12 May 2008 pointing out that the contents of the assistant registrar's letter to the applicants were indeed incorrect, retracting those contents and apologising to the applicants. Three further documents are worth mentioning. Two are from the legal representatives of the 1st, 2nd, 5th and 6th respondents and are addressed to the registrar. They were not copied to the applicants. The first of these, dated 06 July 2009, states that "... [t]he appellants have up to date failed to properly prosecute the appeal. Furthermore up to date no record has been lodged in terms of the Rules. We accordingly wish to apply for a date of trial in this matter..." The letter ends with thanks to the registrar for her "kind cooperation." The next letter, signed by the legal representatives of the 1st, 2nd, 5th and 6th respondents and dated 28 October 2009, was also addressed to the registrar and marked "Personal attention: Mrs E. Schickerling." It reads: "The telecom of yesterday's date between yourself and the undersigned refers. We annex hereto a copy of our letter dated 6 July 2009 for ease of reference. As informed by the undersigned, we would like to have this matter being enrolled as early as possible. The matter is urgent in the sense that a result will have an important bearing on similar pending matters and actions instituted already in the High Court. It would appear that this matter could be finalised within a very short time as it is our submission that it is not properly before court in view of the failure of appellants to file the record and to prosecute

the appeal properly. We thank you for all your kind co-operation herein ..." The third letter, dated 03 March 2010 and addressed to the Chief Justice, is a reaction to the two preceding letters and contains bitter comment from the applicants who state that they "obtained copies of the letters by sheer chance on 2 March 2010." The applicants ascribe the worst motives to the respondents and the registrar, labelling them as evidence that extensive discussions had taken place and agreements reached between the registrar and the legal representatives of the respondents, to dispose of applicants' case clandestinely. They claim that there was an express intention to dispose of "similar**"** pending matters in the High Court and that "...[i]t is clear that for all intents and purposes the case had been disposed of already and we [the applicants] are only required to give the entire procedure a semblance of respectability and legitimacy by appearing before Court" and that "the stage is set for a massive abortion of justice." They see the courteous ending of one of the letters objected to - "[w]e thank you for your kind co-operation herein" - as reinforcement for their view that there was complicity. The last communication is addressed to the Chief Justice and is marked "For Filing". It does not purport to be an application for any substantive relief, nor does it suggest what the Chief Justice should do about the complaint. What it does claim is that the Chief Justice's prerogatives and the duty and the functions of the Court have been interfered with and this had occurred with the assistance of the registrar. It ends by giving notice to the Chief Justice that the applicants: (a) "... are forced to defer the submission of [their] heads of argument to next week as the new knowledge of the registrar and respondents' conduct has introduced new issues. [They] will submit the necessary application to be condoned." (b) "[They] ... intend to apply for a declaratory order on the conduct of the registrar with regard to her

undermining of the dignity and the integrity of the Court and her fitness as registrar." (c) "In conclusion, [they] object in the strongest terms possible to partake in a hearing arranged and set down by respondents and not a hearing set down in terms of rule 10 of the Rules of the Supreme Court."

[5] I am not aware whether or not the applicants have pursued these complaints, including an application for a declaratory order in another forum. As far as this hearing is concerned, both the applicants and the respondents have filed heads of argument and the application for condonation by the applicants has been argued before the Court on the basis of the notice of set-down issued by the registrar. The essence of the applicants' complaint is that the respondents approached the registrar to set the condonation application down and the registrar complied. The applicants take exception to this and claim that the application was accordingly not set down in compliance with Rule 10. From these facts, the applicants draw the inference of collusion and complicity between the registrar and the respondents. It is against this background and the serious allegations that have been levelled, that I must address myself to the purpose of rule 10.

[6] Rule 10(1)[3] is concerned with the setting down of a date for the hearing of an application or other proceeding. It gives the registrar direction as to when it is appropriate, "as the case may be", to set a matter down for hearing. It is, for

[3] Rule 10(1), which is the applicable part of the rule for the setting down of a date for a hearing, provides as follows: "The Registrar shall, after the provisions of rules 3, 5, 6 or 7 as the case may be, and rule 8 and 9, as the case may be, have been complied with and subject to the directions of the Chief Justice, notify the parties or their respective attorneys of the date of hearing, if any, in writing."

instance, clear from a reading of rule 10(1) that the date for the hearing of an appeal cannot be fixed until there has been compliance with the other applicable rules; for example, the lodging of the appeal record - rule 5(5)(b) – or the furnishing of security where it is a requirement, as the case may be, – rule 8 – or where condonation for non-compliance has been granted. Rule 10(2) deals with a situation where a litigant fails to appear before the court to prosecute his or her case. There is nothing in rule 10 that precludes any litigant who has cause to do so, including a respondent in an application or other proceeding, from approaching the registrar for a trial date or a date for the hearing of an application for condonation. However, none of the provisions qualified by the phrase “as the case may be,” in rule 10(1) have any application or relevance to an application for condonation such as the present. That being the case, the claim that the setting down of the hearing of the application was in breach of rule 10 is without any foundation and must be rejected.

[7] It goes without saying that the registrar’s office should always conduct itself with scrupulous compliance with the rules and the directions of the Court and the Chief Justice. If, for instance, the registrar had not taken steps to countermand, correct and withdraw the letter addressed to the applicants by the assistant registrar, which she also apologised for, that would be grounds for grave concern. At the same time, where the registrar accedes to a request by a litigant to do something that is provided for in the Rules, that cannot be said to be collusion in itself. The question must always be whether the registrar or her office breached the provisions of any rule by acting inappropriately and with bias and a lack of impartiality.

[8] There is a further consideration, however, that supports a rejection of the complaints by the applicants. At the hearing, the applicants were asked whether they had suffered any prejudice from the fact that the setting down of the application had been activated by the respondents and not through a request by the applicants. The applicants were unable to demonstrate how the setting down of the application had prejudiced them, if at all. It should be noted that the date for the hearing of the application was only fixed in November 2009, 8 months after the application for condonation was lodged; the date fixed for the hearing, 07 April 2010, was a further five months later. Both the applicants and the respondents have complied without demur with the notice of set down issued by the registrar and they have filed heads of argument and presented themselves before this Court for the hearing of the application for condonation. There was no claim that the applicants were prejudiced by the date for the hearing of the application, nor was there a complaint by the applicants that the hearing had been set down prematurely. If the set down date were in fact too early for the applicants, it would have been within their rights to protest and to seek an appropriate date. This did not happen. As it is, one cannot infer in this case that the registrar acted improperly, on the instructions of the respondents. I am accordingly not persuaded that there is any collusion or complicity between the respondents and the registrar as alleged.

[9] It should be noted that some of the problems in this matter could have been avoided if communication between the parties had been conducted in a more collegiate way. In particular, correspondence by one party to the registrar should,

unless precluded by the Rules, be copied to the opposing party. This practice which is dictated by common courtesy, has not always been observed in exchanges in this case. There can be no good reason, for instance, why the letters by the respondents requesting the setting down of the condonation application should not have been copied to the applicants. In the nature of things, the case file at the registrar's office is open and accessible to either litigating party and this in itself should be sufficient to demonstrate the futility of such conduct, which may, in certain circumstances give the impression of "ambush tactics". As stated above, however, I do not find any evidence to support the allegation that there was complicity. The setting down of the condonation application is, accordingly, unassailable. I turn now to deal with the question whether condonation should be granted in this case.

[10] The procedure on appeal is, for present purposes, governed by rule 5. An appellant who wishes to prosecute an appeal in this Court is obliged to take certain steps within specified time periods. In this case, after Muller J's judgment was handed down on 07 March 2006, and after the applicants had filed their appeal on 16 March 2006, the provisions of rule 5 became applicable. The rule obliged the applicants, as the appellants, to lodge with the registrar of this Court four copies of the appeal record within 3 months of the date of the judgment, and deliver such number of copies to the respondents as might be considered necessary [rule 5(5)]. The period of three months could be extended if agreed to in writing by the respondents [rule 5(5)(c)]. The consequence of failure to comply with the Rule is that the appeal will be deemed to have been withdrawn, unless the non-compliance has been condoned and the appeal reinstated. (*Vivier v Winter,*

Bowkett; Bowkett v Vivier 1942 AD 25 at 26; *Bezuidenhout v Dippenaar* 1943 AD 190; *United Plant Hire (Pty) Ltd v Hills and others* 1976(2) SA 697 (D) at 699 D – H; *Moraliswane v Mawili* 1989(4) SA 1(A) at 8 B-C; *Schmidt v Theron and another* 1991(3) SA 126(C) at 130 C- F.

[11] It is common cause that the applicants failed to lodge the appeal record within the time specified in the Rules. In an attempt to comply with rule 5(6)(b), the applicants, by letter dated 30 May 2006 addressed to the respondents and copied to the registrar, requested an extension of the period to lodge the appeal record. As reason for the delay, the applicants stated that they were still awaiting approval of their application for legal aid. They requested the respondents to indicate within 5 days their agreement for the applicants to lodge the appeal record "...as soon as legal aid is approved or as soon as possible after any decision in that regard had been made." They indicated that they would apply for condonation should respondents decline to agree to an extension of the time. By letter dated 23 June 2006, 1st and 2nd respondents, pointing out that applicants had not furnished any details regarding the dates when the application for legal aid had been made and when it would be approved, refused to consent to the extension of time and gave notice that they would oppose the application for condonation. 5th and 6th respondents likewise refused the request for an extension. What followed was the lodging of the application for condonation on 16 March 2009 in the form of a notice of motion supported by a founding affidavit by 1st applicant. The condonation sought was for the failure to file the appeal record timeously in terms of the rules. At the time the application was lodged, 2 years and 9 months had elapsed since the judgment by Muller J had been handed down.

[12] An application for condonation is not a one-sided exercise designed for the convenience only of the applicant. There are other interests involved. It has been held that matters to be taken into account in an application for condonation include "the respondent's interest in the finality of the judgment, the avoidance of unnecessary delay in the administration of justice and, lastly but not least, the convenience of the Court." (*Napier v Tsaperas* 1995(2) SA 665 (A) at 671 A-C; *Cairns Executors v Gaam* 1912 AD at 193 referred to with approval in *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SCA) at 169 A-C). An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules. 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 that there has been a failure to comply. (See *Commissioner for Inland Revenue v Burger* 1956(4) SA 446 (A) at 449; *Saloojee and another NNO v Minister of Community Development* 1965(2) SA 135 (A) at 13 H-A; *Estate Woolf v Johns* 1968(4) SA 492 (A) at 497 C – D; *Immelman v Loubser en 'n Ander* 1974(3) SA 816 (A) at 820 D – G; *Fanapi v East Cape Administration Board* 1983(2) SA 688 (E) at 689 I to 690 A.)

[13] In seeking condonation, the applicants have to make out their case on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it. 1st applicant states the following in her

affidavit [**my *paraphrasing***]: (a) some of the cassettes (6 of the 12 cassettes) of the taped record were found to be missing and the 1st applicant had to assist in their search. There is no indication in the affidavit when it was discovered that the tapes were missing, only for them to be found in November 2007. There is further no attempt to explain precisely how long it should take for the record to be ready after the tapes were found. What the affidavit does state is that preparation of the record should be completed within two weeks from 16 March 2009. The intervening 16 month period after the tapes were recovered is not accounted for. (b) It is stated further that the applicants have had to face massive legal costs. There is no explanation of what these costs were about and how they relate, if they do, to the failure to lodge the appeal record timeously. According to the founding affidavit, legal aid was approved on 13 July 2006 and Mr Lucius Murorwa was appointed as the legal aid counsel. He however withdrew on 31 October 2007, one year and 3 months later. What we are not told is why he withdrew, or whether this has anything to do with the failure to lodge the appeal record. Nor are we told what he did while he was legal aid counsel to facilitate the lodging of the appeal record. In 2008 the director of legal aid informed the applicants that legal aid funds were depleted and legal aid would accordingly not be available to assist the applicants until further notice. When precisely in 2008 this information was imparted is not revealed. It is thus not clear whether or not this has a bearing on the failure to lodge the appeal record timeously.

[14] On the prospects of success, the applicants were informed by legal aid that the appeal had no chance of success and legal aid would be cancelled. The applicants state that they would appear in person and that they would not rely on

legal aid and make the bland assertion that they have good prospects of success. The reader is left wondering what this is based on, particularly in the light of a different conclusion arrived at by the legal aid board. Overall, the affidavit leaves one with an overriding sense of haphazard statements being made without an attempt at seriously tackling the issues and satisfying the Court that this is a matter in which condonation should be granted. It is a most unsatisfactory application and, in itself, fails to persuade that this is a matter in which condonation should be granted. In arriving at that conclusion, it is not necessary for me to have regard to the fact that the application for condonation is opposed by the respondents. The applicants have failed to put up a proper case for condonation and this application can accordingly not succeed.

[15] To summarise, therefore, when the applicants failed to obtain the consent of the respondents for an extension of the time to lodge the appeal record, the issue of condonation immediately came to the fore. Although 1st applicant had stated on 30 May 2006 in their letter to the respondents that if the respondents were to decline to agree to an extension of the time to lodge the appeal record, an application for condonation would be lodged, no such application was made until 16 March 2009. Nor is there any explanation in the application itself why so much time - some 2 years and 9 months – elapsed before the application was made. Furthermore, having prepared the application for condonation, such as it was, the applicants did nothing to prosecute it. It was the respondents who finally took the initiative to request a date for the application to be heard. `To compound matters further, 1st applicant states twice in her founding affidavit of 16 March 2009 that the process of preparing the appeal record should be completed within two weeks.

That two week period was not complied with. The appeal record was actually filed after 11 months and there is no explanation proffered for the further delay.

[16] In this case, applicants knew as early as the beginning of June 2006 that they would be unable to lodge the appeal record timeously. That was at the time when they wrote to the respondents, seeking consent to extend the time for lodging. When their request was turned down, they would have known that the only route open to them would have been through an application for condonation. Knowing, as they did, the very long delays that had been involved in the course of litigation that had dragged on since 2001, it is inconceivable that they did not have an appreciation that they had an obligation to furnish full and comprehensive explanations of all delays, at the earliest .possible opportunity, if they were to be granted condonation. Their failure to pursue the application with some diligence, even after it had been set down at the instance of the respondents, indicates a flagrant disregard for the processes of the Court and for the Rules.

[17] An Opposing Affidavit, attested to by Charlotte Morland on behalf of the respondents, has however been lodged on 17 April 2009. She describes herself as Manager Credit: Remedial Accounts employed by First National Bank of Namibia Limited, the second respondent. She states that she is duly authorised by the second respondent and SWABOU Investments (PTY) Ltd (SWABOU) (the successor of the first respondent) and had furnished affidavits and supporting affidavits in previous related proceedings before the High Court concerning the property (ERF 4479) in question. She then proceeds to give a history of the litigation and of the property and the unsatisfied indebtedness arising out of its

occupation by the applicants. She states that default judgment was entered against the applicants on 26 November 2001 and that there were various (no less than six) sales in execution that had been arranged because of applicants' failure to satisfy the judgment debt. Each of the 6 sales in execution had been cancelled at applicants' request. 5th and 6th respondents eventually bought the property at the 7th sale in execution on 24 March 2005 and, although the property has been transferred into their name, they had been unable to take occupation because applicants had remained on the property.

[18] Charlotte Moreland opposes applicant's application for condonation and the applicants' appeal on the merits on behalf of the respondents. On the condonation issue, she points out that although Muller J's judgment was delivered on 07 March 2006, the appeal record had still not been filed by 01 April 2009. One consequence of the delay to lodge the appeal record is that the appeal could not be set down for hearing since the effect of the Rules, *inter alia*, is that the appeal record should be lodged before a trial date could be obtained (rule 5). She explains that the 5th and 6th respondents, in particular, have been severely prejudiced in that they have not been able to take occupation of the property since they had bought it.

[19] There was no replication from the applicants to Charlotte Morland's affidavit. What the applicants did do in their heads of argument filed shortly before the hearing of the condonation application, was to pursue the challenge against the status of the respondents and that of Ms Morland in the litigation. These are challenges which are the subject of the appeal as they had been rejected by

Muller J in his judgment in the court *a quo*. It is not necessary to rehash the arguments proffered by the applicants at this stage, in this application for condonation, save to state that the conclusion drawn by the applicants from their own arguments is that there is no competent opposition to the application for condonation. It should suffice to state that in an application for condonation, it is for the Court to decide whether or not a proper case for condonation has been presented to it by the applicants. In light of the approach I have adopted in this case, it is not necessary to deal with the applicants' objections in these proceedings. The question that the Court has to answer is whether or not a proper case has been made for the granting of condonation and I have found that applicants have not succeeded.

[20] I conclude therefore that this is not a proper case for condonation to be granted. 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.

[21] *Order*

The application is struck off the roll.

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LANGA, AJA

I agree.

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CHOMBA, AJA

I agree.

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MTAMBANENGWE, AJA

COUNSEL ON BEHALF OF THE APPELLANTS:	In Person
COUNSEL ON BEHALF OF THE 1st, 2nd, 5th and 6th RESPONDENTS:	Ms. Vivier
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