REPORTABLE

CASE NO: SA 8/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STANDARD BANK OF NAMIBIA LTD **Appellant**

and

ATLANTIC MEAT MARKET (PTY) LTD **Respondent**

Coram: SHIVUTE CJ, MARITZ JA and CHOMBA AJA

Heard: **7 April 2006**

Delivered: **17 October 2014**

APPEAL JUDGMENT

MARITZ JA (SHIVUTE CJ and CHOMBA AJA concurring):

[1] The principal issue in these proceedings is whether the High Court's refusal to accord appellant more time to prepare and lodge answering affidavits in opposition to respondent's application for an urgent interlocutory interdict constituted an irregularity in the proceedings contemplated in s 16(1) of the Supreme Court Act, 1990 or

violated appellant's right to a fair hearing as an aspect of his right to fundamental justice in common law or to a fair trial guaranteed by Art 12(1)(*a*) of the Constitution. The adjudication of this issue calls for an analysis of the purpose and place of urgent interlocutory interdicts in our law of legal practice and procedure.

[2] The proceedings in this court were initiated by what, on the face thereof, purports to be a 'notice of appeal' against an order of the High Court made by Silungwe J on 15 March 2005 in an application brought by Atlantic Meat Market (Pty) Ltd (respondent) against Standard Bank of Namibia, Ltd (appellant) for a rule *nisi* and urgent interim interdictory relief. The relevant part of the notice, which sets out the constitutional and other challenges to the proceedings in the court below and to the validity of the order appealed against, reads:

'NOTICE OF APPEAL

> PLEASE TAKE NOTICE that the above-named appellant hereby notes an appeal against the whole order including the order for costs handed down by Mr Justice Silungwe on 15 March 2005 in case number (P) A 65/2005.
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> PLEASE TAKE FURTHER NOTICE that the appeal is filed as of right on the basis that the learned Judge erred in granting the order in conflict with the provisions of Art 12 of the Namibian Constitution in that the learned Judge refused to grant the appellant time to file affidavits in opposition to the application lodged by the respondent, as a result of which an irregularity occurred in the proceedings as envisaged in s 16 of the Supreme Court Act 15 of 1990.'

[3] At the hearing, Mr Henning SC (assisted by Mr Heathcote) for appellant redefined the basis of appellant's challenge: despite the language used in the notice and the express label attached to it, he stated that the matter before the court was not an appeal and, the reference to s 16 of the Supreme Court Act[1] in the notice notwithstanding, that the proceedings before this court might not even be a review. He asserted that it was a constitutional challenge directed against the refusal of the court *a quo* to grant appellant more time to file answering affidavits, thereby denying appellant's right to natural justice as embodied in the *audi alteram partem* rule and, as a consequence, violating its right to a fair hearing guaranteed by Art 12(1)(*a*) of the Constitution and derogating from the constitutional principles of justice and the rule of law that underpin the foundation of our State.

[4] Counsel expounded in argument on the principles of justice – which, he contended, is the product of strict rules infused with fairness – and the rule of law, by referring to *a quo*tation from the seminal work of De Smith, Woolf and Jowell on *Judicial Review of Administrative Action*:[2]

> '(T)he standards applied by the courts in judicial review must ultimately be justified by constitutional principles, which govern the proper exercise of public power in any democracy. This is so irrespective of whether the principles are set out in a formal, written document. The sovereignty or supremacy of Parliament is one such principle, which accords primacy to laws enacted by the elected Legislature. The rule of law is

[1] Investing this Court with powers of review as a Court of first instance in defined instances.

[2] 5 ed, 2 rev, (Sweet & Maxwell, London, 1995) at 14-15, cited with approval in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 40.

> another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify - albeit not always explicitly - a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard; and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.'

[5] He reminded the court of the remarks of Lord Morris of Borth-y-Gest in *Wiseman v Borneman* on the concept of natural justice and the notion of fairness:[3]

> 'My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". '

[3] [1971] AC 297 (HL) ([1969] 3 All ER 275) at 308H-309B (AC) and 278C-E (All ER) – cited in *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C) at 304F-H.

He also referred to a number of authorities[4] in support of the contention that 'in our law the so-called *audi alteram partem* and *nemo iudex in sua causa* rules are but part of . . . the "fundamental principles of fairness"'[5] and, as regards the application thereof, cited Tucker LJ's dictum in *Russell v Duke of Norfolk and Others*[6] which is in the following terms:

> 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'

[6] I interpose here to note that counsel for respondent did not take issue with the relevance or substance of any of these general propositions. The divergence in their contentions relates to the application of these propositions in the circumstances and exigencies of this case.

[7] Counsel for appellant forcefully reasoned that, as in administrative law, a reasonable time to prepare is inherent in the right to a fair hearing contemplated in Art

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[4] Amongst them *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others*, *ibid* and *Marlin v Durban Turf Club and Others* 1942 AD 112 at 126.

[5] Compare: *Dabner v South African Railways* 1920 AD 583 where Innes CJ spoke of the fundamental principles of justice as: 'Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned; those parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartially discharged.'

[6] [1949] 1 All ER 109 (CA) at 118D-E. This dictum, as Farlam noted in *Van Huyssteen's* case, has been quoted with approval from time to time in South African decisions: see for example *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646E.

12(1)(*a*)[7]. Thus, he contends that the refusal of the court *a quo* to allow appellant time to answer the application constituted a fundamental irregularity in the proceedings and, in effect, restricted argument to the facts of an unanswered application. Given the courts' constitutional duty to uphold and respect the fundamental rights protected in Chapter 3 of the Constitution[8] and the power of competent courts to 'make all such orders as shall be necessary and appropriate to secure (persons) the enjoyment of their rights and freedoms under the provisions of (the) Constitution',[9] this court is obliged to redress the violation of appellant's right to a fair hearing by providing an effective remedy - if necessary, by forging new and innovative procedural 'tools' to achieve this goal.[10]

[8] Ms Vivier, on the other hand, argued with reference to *Nortje en 'n Ander v Minister van Korrektiewe Dienste and Andere*[11] that the *audi alteram partem* rule

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[7] He referred, amongst others, to *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T) at 486F-G where it was stated 'that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations' and, by parity of reasoning, also to Art 12(1)(*e*) of the Constitution.

[8] See: Art 5 of the Constitution.

[9] Compare: Art 25(3) of the Constitution.

[10] Counsel referred in support to *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), para 69 where Ackermann J said the following with reference to the South African Constitution: 'this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

[11] 2001 (3) SA 472 (SCA) at 479I/J to 480C. Compare also *Van Huyssteen*'s case at 305C-D where the Court held that what is of importance is that 'the principle and procedures which, in the particular situation or set of circumstances, are right and just and fair' are applied.

cannot be separated from the context in which it is applied. The headnote to the judgment captured the essence of the court's reasoning on that point as follows:

> 'There is no universally applicable set of requirements for compliance with the *audi* rule. On the contrary, because of the innumerable situations in which it may be applied, the *audi* rule is so flexible and adaptable that the requirements for compliance therewith cannot be separated from the context in which it is applied. The touchstone which must be utilised in determining whether the *audi* rule was complied with in a specific case is intimately connected with the fundamental principle of the rule. The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances the public official or body concerned must act fairly.'

[9] Ms Vivier points out that the application under consideration was brought on a basis of urgency in terms of High Court rule 6(12). The sub-rule provides that, in applications of that nature, a court may dispense with the forms and service provided for in the rules and may dispose of the matter at such time and place and in such manner and in accordance with such procedures (which shall as far as practical be in terms of the rules) as it may deem fit. She argues with reference to a number of authorities[12] that the granting of urgent *ex parte* relief (or, as in this case, where very short notice was given to appellant) is one of the recognised exceptions to the strict enforcement of the *audi alteram partem* rule. Given the nature of the proceedings and the relief sought, she submitted, the refusal of the postponement and the order

[12] Such as *Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others* 1986 (2) SA 264 (W) at 274B–275C; *Ex Parte Beach Hotel Amanzimtoti (Ptv) Ltd* 1988 (3) SA 435 (W) at 439C and *Visaqie v State President and Others* 1989 (3) SA 859 (A) at 865A-D.

subsequently made by the High Court were neither unfair nor irregular. As such, they did not detract from appellant's right to a fair trial.

[10] In order to consider these conflicting contentions, it is necessary to briefly refer to the facts and circumstances that gave rise to the dispute; to record the relief prayed for and to summarise the proceedings in the High Court as they unfolded.

[11] Respondent, an incorporated private company with limited liability, carries on the businesses of a butchery and of a manufacturer, wholesaler and distributor of meat in Walvis Bay. Appellant is a registered commercial bank and, at all relevant times, acted as bankers for respondent and its sister company, Marketlink Namibia (Pty) Ltd, both being subsidiaries in the Marketlink group of companies. As security for a facility of N$5 million that appellant extended as working capital, it sought and obtained securities to cover the extent of respondent’s indebtedness from time to time. The instruments of security included a number of unlimited suretyships as well as a cession of respondent’s book debts.

[12] During April 2004, respondent uncovered a massive fraud which had been devised and perpetrated by the financial manager of the Marketlink group of companies. In executing the fraudulent scheme, the financial manager forged signatures on cheques drawn against the accounts of companies within the group and used the cheques to misappropriate funds that he channelled into his own account and that of his wife whilst, at the same time, skilfully avoiding detection by

‘shifting’ funds from one company's account to that of another in the group. Unbeknown to respondent and Marketlink Namibia at the time, seven forged cheques to the sum of N$2 322 456,10 were drawn against respondent’s bank account and 23 cheques to the sum of N$9 250 133,47 were drawn against the bank account of Marketlink Namibia. The cheques were honoured by appellant notwithstanding the forged signatures and debited against the two bank accounts during the period 31 December 2003 to 26 April 2004.

Shortly after the forgeries had been uncovered, respondent alerted appellant to them and pressed criminal charges against the financial manager, as a consequence of which both he and his wife were arrested and charged in criminal proceedings. Respondent and Marketlink submitted a report to appellant about the fraudulent transactions and demanded that appellant rectify their respective banking accounts. Despite numerous further enquiries over a number of months, appellant failed to state its position as regards the forged cheques and the demand for rectification, other than to state that the matter had been referred to its Internal Audit Department for further ‘actioning’. As a result, respondent and Marketlink Namibia issued summons on 26 October 2004 against appellant seeking, amongst others, an order that their respective accounts be credited with amounts equivalent to the unauthorised withdrawals and interest charged thereon. Appellant entered appearance to defend the action.

[13] As respondent maintained that it did not owe appellant the debits passed against its bank account upon presentation of the forged cheques, it declined to comply with appellant's demand that it should execute further securities in favour of appellant or pay the balance outstanding occasioned by the unauthorised withdrawals. On 2 March 2005, respondent became aware of the fact that appellant had forwarded letters by registered mail and telefax to respondent's debtors, informing them that it was holding a cession of their debts owing to respondent and that it was entitled to collect such debts in terms of the cession. It also notified respondent's debtors that they should pay all amounts due to respondent into the latter's account with appellant. In addition, appellant aggressively pursued its quest to recover respondent's debts by telephoning the latter's debtors and demanding that they should pay those debts directly to appellant. Appellant's demands raised serious concerns amongst respondent's debtors about respondent's financial health and its continuing ability to honour contracts for the supply of meat products to them. Respondent received more than 100 telephone calls from debtors within a short period of time and the concerns raised by some of them have been recounted in respondent's founding affidavit. As a result of appellant's conduct, rumours began to circulate that respondent was in serious financial difficulties and was facing possible liquidation. This, in turn, had an extremely negative effect on respondent's credit standing with its suppliers. Respondent found itself in the unenviable position that it was not only losing clients as a result of appellant's conduct but, given the latter's demand that all respondent's debtors should pay their debts directly to appellant, respondent's cash flow was in danger of drying up within days and it would become

unable to trade altogether. If respondent had to close down, it would not only cause immeasurable damage to its business, but would also result in the termination of the employment of some 100 employees.

[14] Respondent therefore directed a letter of demand to appellant's legal practitioners on 3 March 2005 to provide it, by no later than the close of business on that day, with an unequivocal undertaking that appellant would forthwith desist from approaching respondent's debtors and from collecting debts due by them to respondent pending the outcome of the action instituted by respondent against appellant. It was further recorded in the letter that the cession of respondent's book debts had been given to appellant as security for respondent's indebtedness to the bank and, because it had a claim against appellant in excess of N$11 million, that respondent was not indebted to it at all. When appellant failed to comply with the demand, respondent launched an urgent application on 7 March 2005 for an order:

> '1. Condoning the non-compliance with the Rules of this Honourable Court and granting leave to the applicant for this matter to be heard on an urgent basis as provided for in Rule 6(12) of the High Court Rules;
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> 2. In terms whereof a rule *nisi* be issued calling upon the respondent to show cause at 10h30 on 4 April 2005 why respondent should not be:
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> 2.1. Interdicted and restrained from exercising any rights in terms of the cession of book debts held by it;

2.2. Interdicted and restrained from contacting any of applicant's debtors in any manner whatsoever in order to recover applicant's book debts from them;

2.3. Ordered and directed to forthwith pay over each and every amount received on applicant's account held with respondent from 28 February 2005 to date;

2.4 Ordered to pay the costs of this application;

2.5 Such further and/or alternative relief as the above Honourable Court may deem meet should not be granted to applicant;

3. An order in terms whereof subparagraphs 2.1 – 2.3 shall serve as an interim interdict pending the outcome of the action instituted by applicant against respondent under case number (T) I 2460/04 with immediate effect.'

[15] Respondent's founding affidavit set out the whole history of the relationship between the parties and the manner in which appellant dealt with respondent's demands to credit its account with the amounts earlier debited on presentation of the forged cheques. It also pointed out that appellant, for almost a year since the fraudulent scheme had been brought to its attention, had failed to disclose a defence to respondent's multiple demands for rectification of its account.

Respondent also averred that it had no alternative remedy but to stop appellant from further recovering the book debts of customers that were owing to respondent. It asserted that it had a clear right to the relief, as it was not indebted to appellant at all and that it would suffer irreparable damage should it not be granted an interim

interdict to preclude such collection, pending the outcome of the instituted action. It further stated that the balance of convenience favoured the granting of the order prayed for, as appellant had additional security in the form of sureties for any indebtedness of respondent, that, although denied, may eventually be proven to exist. It averred that it would be impossible to bring an application for the interlocutory relief in the ordinary course since any delay in launching the application would result in respondent’s complete demise.

[16] The application was delivered to the offices of appellant's legal representatives at 08h45 on the morning of Monday, 7 April 2005. When the application was called in court later that morning, Mr Heathcote, who appeared on behalf of appellant, immediately moved an application from the bar for a postponement until Monday, 14 March 2005 to allow appellant time to consult with its legal representatives and to lodge answering affidavits in opposition to the application. Ms Vivier opposed the application. She submitted that the relief in the main application was being sought on a basis of urgency and that, in a letter received from appellant's lawyers earlier during the day, appellant made it clear that it would not comply with respondent’s demand to desist from collecting the book debts due to it. She emphasised that, absent an undertaking to the contrary, the continued collection of such debts during the period of the postponement would defeat the object of the application to obtain urgent interim relief interdicting appellant’s conduct and saving respondent’s business from ruin. During argument in reply, appellant's counsel re-affirmed appellant's position, i.e. that

it was entitled to collect the debts in terms of the cession agreement and that it would continue with the collection.

[17] Having considered the application for postponement, the urgency of the main application for interlocutory relief and the submissions advanced by both counsel, the court refused the application to postpone the main application. That, however, was not the end of the hearing. Appellant also opposed the granting of an order on the papers as they stood. Hence, Ms Vivier advanced argument in support of the application. After a partial presentation of her argument, the court was constrained by another pressing matter on the roll to delay continuance of the hearing until 14h30 the next day. Appellant's counsel indicated at the time that appellant would probably utilise the opportunity 'to put some version' before the court. When the hearing resumed on the Tuesday, Mr Henning (assisted by Mr Heathcote) appeared on behalf of appellant. He immediately moved an application for security of costs, which appellant had lodged earlier the day. The application was opposed but later granted with costs. Thereafter, further submissions on the merits of the main application were advanced. Eventually, after three days of argument, judgment was reserved and, subsequently, handed down. For the reasons set out in its judgment, the court *a quo* dismissed a number of substantive issues raised on behalf of appellant in argument on the merits of respondent's case and, after dealing with the urgency and other considerations, held that respondent had made out a case for the relief being sought and granted an order in terms of the notice of motion.

[18] Before I turn to the question of whether the court *a quo* violated appellant's common law right to fundamental fairness or its constitutional right to a fair trial when it refused to postpone the urgent application in order to accord appellant an opportunity to lodge answering affidavits, I must briefly interpose to remark on the somewhat curious formulation of the two paragraphs in the notice of motion referring to the rule *nisi* and interim interdict and the effect of the formulation of the one on the other. It is apparent from the papers that respondent sought an interim interdict in the terms set out in paras 2.1 – 2.3 of the notice of motion pending the outcome of the action which had already been instituted by it against appellant. One would therefore have expected the terms of those sub-paragraphs in the rule *nisi* to be qualified accordingly and that the prayer in para 3 would be limited to an interlocutory interdict pending the confirmation of the rule *nisi*. In this instance, the prayers are formulated differently: the expected qualification is absent from sub-paras 2.1 – 2.3 but contained in para 3 which reads:

> 'That subparagraphs 2.1 to 2.3 shall serve as an interim interdict with immediate effect pending the outcome of the action instituted by the applicant (respondent) against the respondent (appellant) under Case No (T) 12460/2004.'

My concern was that the court's order in those terms at the rule *nisi* stage of the proceedings may not be understood as meaning that the interim interdict granted would apply for the entire period during which the main action is pending, irrespective of whether the rule *nisi* is later be confirmed or not. On a closer reading thereof,

however, it must be clear that the granting of the interim interdict in terms of para 3 is conditional on paras 2.1 to 2.3 being part of either the rule *nisi* or the later order confirming it. If the relief sought as part of the rule *nisi* were to be discharged, there would not be any residual order to serve as a substratum for the interim interdict in terms of the prayer in para 3, and the latter would have no further effect. So regarded, the interim interdict granted on 15 March 2005 would have had an interlocutory effect only until the return date or extended return date of the rule *nisi*, and its operation beyond that date would be conditional on the confirmation of the rule. On that premise, I now turn to the main issues in the proceedings: the challenge to the regularity and fairness of the proceedings (on the basis that appellant was denied an adequate opportunity to file answering affidavits in opposition to the application) and appellant's assertion that, as a result, the order was granted in violation of its right to fundamental fairness under common law or to a fair trial guaranteed by Art 12(1)(*a*) of the Constitution and that, for those reasons, it should be set aside.

[19] As counsel for respondent,[13] and some of the authorities cited by appellant,[14] emphasise, 'the *audi alteram partem* rule cannot be separated from the context in which it is applied'. The procedural context in which it finds application in this case is that of an application brought on a basis of urgency for a rule *nisi*, coupled with an urgent interim interdict. The granting of a rule *nisi* in appropriate cases is, as Corbett

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[13] With reference, amongst others, to the passage from *Nortje's* case, cited earlier in this judgment.

[14] See: *Van Huyssteen's* case at 305C-D: 'What he is entitled to is, in my view, what Lord Morris of Borth-y-Gest described as "the principle and procedures . . . which, in (the) particular situation or set of circumstances, are right and just and fair".'

JA remarked in *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*,[15] 'firmly embedded in our procedural law' even though not substantively provided for in the rules of court. He continued:

> 'The procedure of a rule *nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, *prima facie*, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. The rule *nisi* procedure must be considered in conjunction with the provisions of Rule 6 (12) which, in the case of urgent applications, permits the Court to:
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> > "dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet".
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> (And see in this connection *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H - 782G.) In fact, the rule *nisi* procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief.'

[20] In a similar vein, the South African Constitutional Court emphasised in *National Director of Public Prosecutions and Another v Mohamed NO and Others* the need for

[15] 1982 (3) SA 654 (A) at pp 674G-675C.

flexibility in the application of the *audi* rule, especially in circumstances where a rigid application thereof would defeat the very rights sought to be enforced or protected:

> '[27] Before considering the above arguments . . . it is convenient to examine the common-law practice relating to *ex parte* applications, the granting of rules *nisi* and the making of interim orders pending the return day of the rules *nisi*, as well as the importance of the *audi* rule for procedural fairness. For the purposes of this case "an *ex parte application"* in our practice is simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence.
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> [28] Our common law has recognised both the great importance of the *audi* rule as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule *nisi* calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at same time orders that the rule *nisi* should act immediately as a temporary order, pending the return day. This practice has been recognised by the South African courts for over a century:
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> > "The term *rule nisi* is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict."
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> [29] The flexibility and utility of the rule *nisi* acting at the same time as an interim order, has been recognised by the courts and it has been applied to modern problems in commercial suits.'

[21] The nature of the relief sought on a basis of urgency by respondent in this instance falls squarely within the procedures and exigencies referred to in these authorities, and so, too, the context within which the High Court had to apply the *audi* rule. In determining whether the court *a quo* violated appellant's right to fundamental fairness in its application of the *audi* rule (when it declined a postponement of the urgent application at appellant's behest, thereby limiting the opportunity that appellant had to lodge answering affidavits before the court ruled on the urgent application) a number of contextual considerations must be taken into account. In what follows, I shall refer only to four of them.

[22] The first is the urgency that attached to the determination of respondent's application for relief on an interlocutory basis, more so, in view of appellant's uncompromising insistence that it would continue to assert its rights in terms of the cession agreement if the application were postponed. Had it been willing to relent in its efforts to collect the debts due and owing to respondent, if only for the limited period and purpose of a postponement, respondent would not have opposed its application. The court *a quo* was satisfied that respondent complied with the requirements of rule 6(12)(*b*) by setting forth the circumstances which rendered the application urgent and the reasons why it would not be afforded substantial redress at a hearing in due course.

Enjoined by rule 6(12)(*a*) with the duty to see to it that the measure of respondent's non-compliance with the rules were tailored to the concomitant degree of urgency, and to dispose of the application in accordance with procedures consistent with the rules as far as practical in the circumstances, the court granted the prayer for condonation without qualification. This ruling, as pointed out in *Nelson Mandela Metro Municipality and Others v Greyvenouw CC and Others* 'involves the exercise of a judicial discretion by a court "concerning which deviations it will tolerate in a specific case" in the exercise of its judicial discretion'[16] It follows by necessary implication that, given the exigencies of urgency and other circumstances demonstrated in the founding papers of respondent, some of which I have summarised earlier in this judgment, the court, in the exercise of its judicial discretion, concluded that it was an appropriate case in which it should dispense with the requirements of rule 6(5)(*b*) and (*d*)(ii) of the High Court rules as regards the period prescribed for respondents to notify applicants of their intention to oppose applications in the ordinary course and, more importantly for purposes of this case, the time and sequential order within which answering affidavits should be lodged. In this instance, that it was in the interest of fairness and of doing substantial justice between the parties that interlocutory relief should be granted without further delay and that the answering affidavits could be lodged thereafter for consideration on the return day of the rule *nisi* or at an anticipated earlier hearing.

[16]2004 (2) SA 81 (SE) para 37 and the authorities referred to therein.

[23] I turn now to the second consideration. The purpose of interlocutory interdicts, in essence, is to preserve the effectiveness of the judgment of the court when rendered in due course. To that end it protects existing rights that have been clearly or *prima facie* established[17] and 'provisionally restrain(s) the parties to a civil suit from taking any action that could endanger the final decision of the court.'[18] Generally, the immediate objective is 'to obtain an order of court preserving or restoring the status quo pending the final determination of the rights of the parties'.[19] As such, it is an extraordinary remedy judicially designed to ensure that the court will ultimately be in a position to do substantial justice in the case and that any judgment it may render in due course will be effective. Given its extraordinary nature, access to the remedy is filtered by a number of stringent requirements crisply summarised by Corbett J (as he then was) in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd*:[20]

'(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

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[17] Prest, *Interlocutory Interdicts* (1993, Juta and Co, Ltd), p 2.

[18] As the European Court of Human Rights, taking its decision during a plenary session of the Court noted with reference to 'interlocutory injunctions' in the case of *Observer and Guardian v The United Kingdom* (1992) 14 E.H.R.R. 153 noted.

[19] Prest, ibid.

[20] 1969 (2) SA 256 (C) at 267B–D. Endorsed in this jurisdiction by the High Court, amongst others, in *Kaulinge v Minister of Health & Social Services* 2006 (1) NR 377 (HC) at 387E-F.

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.'

Respondent's affidavit set forth facts to the satisfaction of these requirements and the court *a quo* found that they were sufficient to justify the granting of interdictory relief, at least for the period preceding the return day (or anticipated return day) when the confirmation or discharge of the rule *nisi* could be considered. Except for joining issue on a number of grounds with respondent's assertion that it had established a clear or *prima facie* right in its founding affidavit - grounds the court considered and dismissed - I did not understand appellant to say that respondent had not satisfied the other requirements. Respondent stated that it had no alternative remedy to stop appellant from continuing to collect debts due to it (respondent) and made it clear, in no uncertain terms, that if it had to bring the application in the normal course, appellant's continuing conduct in the interim would result in respondent's complete demise. The implication thereof must have been clear to the court *a quo*: aside from the devastating consequences respondent's demise would have on the engagement of its more than 100 employees, respondent would also not be in a position to pursue justice by having its claim against appellant in the main action adjudicated.

[24] The third consideration is that the issuing of a rule *nisi* is neither a final nor definitive determination of the rights of the parties in the application. By its nature, the rule does not dispose of the relief being sought – that may only happen on the return

day of the rule or, depending on the nature of the relief, in the main proceedings. Generally, if, due to the urgency and exigencies of the matter, it is directed that the rule *nisi*, or any part thereof, should apply immediately as a temporary order without first according other affected or interested parties an opportunity to answer to the allegations that underpin the relief, such parties are expressly called upon by the court 'to show cause' before the return date why the relief as set out therein should not be granted. Thus, they are thereby granted an opportunity to state their case in opposition to the application before the relief being sought is finally determined.

This procedure, compelled by the exigencies of matters in circumstances where a rigid application of the *audi* rule would otherwise frustrate or obviate the very purpose of the proceedings, demonstrates the more flexible application of the rule. It allows for an opportunity to respond to the application after a provisional ruling has been made and interim relief has been granted, but before the matter will be enrolled on the return date for final determination (or, in instances such as the application under consideration, whether interdictory relief should be accorded pending the outcome of the main proceedings, which are to be adjudicated in due course).

I interpose here to remark that, whatever the position may be in other jurisdictions, the evidential burden that applicants bear to establish their entitlement to interdictory relief on the return day is not lessened by the fact that rules *nisi* or interlocutory interdicts have been granted at an earlier stage during the proceedings. On the contrary, in instances where final interdicts are sought on the return day, the overall

basis on which the courts approach the evidence, especially in the event of factual disputes, will generally be more favourable to respondents compared to the approach adopted by the courts when they consider the granting of interdictory relief of an interlocutory nature in the first instance.[21]

[25] The fourth consideration is based on the provisions of rule 6(8) of the High Court rules: any person 'against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice'. The effect of the rule is clear: if a rule *nisi* or interim interdict has been granted against a person without first according him or her an opportunity to oppose or respond to the application, he or she need not wait for the return date to challenge the rule *nisi* or interim interdict, but may anticipate it at a hearing on 24 hours' notice, or even shorter, if justified under the circumstances.[22] The sub-rule, therefore, creates a procedural mechanism for affected parties to be heard on very short notice for the purposes of challenging a rule *nisi* or interlocutory relief granted against them on a *ex parte* basis.

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[21] See: *Rally for Democracy & Progress and Others v Electoral Commission of Namibia and Others* 2013 (3) NR 664 (SC) para 99, and the authorities referred to therein, for a brief discussion of the differing approaches in considering the granting of interim interdicts as opposed to that applied in the case of final interdicts.

[22] Compare, for instance, *Lourenco v Ferela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (T) at 290B-C where Southwood J applied the sub-rule as follows: 'In terms of Rule 6(8) any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice. Respondents advised the applicants before 13:00 on 6 November 1997 that they wished to set aside the order and they indicated this clearly to the applicants' legal representatives when they met at Court. Sufficient notice was given and, if this is not so, if this is not strictly in terms of the Rule, it can and must be condoned. Insofar as this may be relevant I grant condonation for any failure to comply with the provisions of rule 6(8).'

[26] For these reasons, I am satisfied that, regard being had to the inherent flexibility of the *audi* rule, the court *a quo* properly moulded its application to meet the circumstances and address the exigencies of the application under consideration in the interests of fairness and justice. The context which informed the manner of the rule's application included the following: the interlocutory nature of the relief sought and granted; the urgency that attached to the application; the *prima facie* strength of the case as established by respondent; the unavailability of any other satisfactory remedy to redress the devastating effect of appellant's conduct on the liquidity and survival of respondent's business; the balance of convenience which favoured the granting of the relief; the well-grounded apprehension established in the founding affidavit that respondent would suffer irreparable harm if the interim relief was not granted and ultimate relief was granted later; the invitation directed to appellant in terms of the rule *nisi* to show cause why the rule should not be confirmed and the ample opportunity allowed for appellant to do so; the procedural mechanisms available to appellant to expedite, on short notice, a setting down of the hearing in order to show that the rule should be discharged; the extent to which the court already granted appellant a hearing (albeit on the founding papers only) and the failure of appellant to 'put some version' before the court during the three days of argument (notwithstanding an indication its lawyer had given at the end of the first day's argument that appellant would 'probably' do so). In these circumstances, I must conclude that appellant's common law right to fundamental fairness in the proceedings before the court *a quo* was not violated and that the manner in which

that court applied the *audi* rule was procedurally 'right and just and fair'[23] in the context and circumstances of this case.

[27] Inasmuch as the same assertion, i.e. that the High Court should have accorded appellant more time to prepare and lodge answering affidavits in opposition to respondent's application, underpins the claim that its common law right to fundamental fairness in the hearing had been violated as well as the claims that an irregularity in the proceedings before the High Court as contemplated in s 16 of the Supreme Court Act, 1990 had occurred, and that its fundamental right to a fair trial guaranteed by Art 12(1)(*a*) of the Constitution had been violated, the conclusion that I have arrived at in the previous paragraph as far as the sustainability of first claim must, by inferential reasoning and on the same grounds, also impact on the substance of the other two. There are, however, certain additional observations that need to be made in relation to the latter two claims.

[28] In *Rally for Democracy & Progress and Others v Electoral Commission of Namibia and Others*[24] this court had occasion to restate the purpose of the rules of court and deal with their application:

> '[66] The rules of court are devised to further and secure procedures for the inexpensive and expeditious institution, prosecution and completion of litigation in the interest of the administration of justice; to facilitate adjudication of the litigation in a

[23] To borrow the phrase from Lord Morris of Borth-y-Gest in *Wiseman v Borneman*.
[24] Para 40.

manner that meets the convenience of, and resources available to the court; to allow the litigants an equal, fair and reasonable opportunity to present their respective cases fully for final determination to the court; to accommodate public interest in the efficiency, regularity, orderliness and finality of the legal process and, finally, to give procedural effect to the constitutional demand that, in the determination of their civil rights and obligations, all persons shall be entitled to a fair and public hearing.'

[67] Given the importance of furthering these objectives and interests, there are compelling reasons why the court, as a general rule, would not countenance non-adherence to its procedures in the absence of sufficient cause. The rules, however, "are not an end in themselves to be observed for their own sake". It has often been said, that the rules "exist for the court, not the court for the rules" and that the court will not "become the slave of rules designed and intended to facilitate it in doing justice". It will interpret and apply them, not in a formalistic and inflexible manner, but in furtherance of the objectives they are intended to serve. But, because the rules cannot conceivably be exhaustive and cater for every procedural contingency that may arise in the conduct of litigation, the court may draw on its inherent powers to relax them or, on sufficient cause shown, excuse non-compliance with them to ensure the efficient, uniform and fair administration of justice for all concerned.

[68] What would constitute "sufficient cause" for the court to grant condonation for the non-compliance with the rules in any given instance, must be determined with reference to the facts and circumstances of each case.'

[29] When condonation is sought under the provisions of rule 6(12) for non-compliance with the rules on grounds of urgency, the exigencies of the case must satisfy the requirements of the sub-rule to justify any dispensation to be granted by the court. Moreover, when urgent applications are brought on an *ex parte* basis for relief that affects the rights or obligations of other persons, our courts will remain vigilant to ensure that the procedure adopted and the extent of any dispensation or

condonation granted in such matters would be tailored, as far as practical in the circumstances, so as not to deviate from the procedures prescribed by the rules of court or impinge on the rights of affected persons thereunder, including the right to be heard, more than the urgency and other exigencies in the matter require. However, if the court finds that the *ex parte* application is urgent; that the extent to which an applicant has failed to otherwise comply with the requirements of the rules may be condoned and that it is an appropriate instance to give directions which deviate from the procedures prescribed by the rules for the further conduct of the proceedings, the court's ruling and directions are interlocutory by nature and made in the exercise of the court's inherent judicial discretion to lay down fair procedures and put interim measures in place that ultimately will allow it to do substantive justice between the parties in the matter. Although those rulings and directions may impact on the procedural rights of the litigants and the further conduct of the proceedings, they are not 'final or definitive of the rights of the parties nor (have) . . . the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. An order that an application should be heard in terms of rule 6(12) is analogous to an order giving a direction in regard to evidence or referring a matter to trial'.[25] As such, it may be revisited and altered by the court of first instance and is not appealable without leave.

[25] See: *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE) at 242G–243I and the quotations and authorities referred to therein.

[30] The condonation granted in this instance by the court below and the directions it gave as regards the further conduct of the proceedings (including the time and opportunity to be accorded to appellant to file answering affidavits) clearly fall within the inherent powers of the court under Art 78(4) of the Constitution[26] and ambit of the judicial discretion accorded to it under rule 6(12) of the rules of court. For the reasons I have given earlier in this judgement, I am satisfied that the court below has exercised its discretion judicially, given the exigencies and circumstances of the case and the overarching interests of fairness and justice. In my view, appellant failed to demonstrate that an irregularity has occurred in the proceedings before the court below. In the result, I do not propose that this court must assume its review jurisdiction and exercise its powers in terms of s 16 of the Supreme Court Act.

[31] It also follows from my reasoning and conclusions that appellant's common law right to fundamental justice has not been impinged, that no irregularity has occurred in the proceedings before the High Court and that appellant's constitutional right to a fair trial under Art 12(1)(*a*) has not been violated.

[32] Before I turn to the remaining issues raised in the appeal, I must refer to a threshold issue that bears on appellant's reliance on Art 12(1)(*a*) of the Constitution. The relevant part of the Sub-Art reads:

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[26] It reads: 'The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose.'

> '*In the determination of their civil rights and obligations* . . . , all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law'. (Emphasis added.)

[33] It is clear from the wording of the Sub-Art, if considered in a civil context, that the fair trial guarantee extends to proceedings that concern 'the determination' of a person's civil rights and obligations. This, it seems to me, is a threshold requirement for aggrieved persons who claim redress for violations of their fair trial-rights under the Sub-Art. This is also how a similarly worded provision of the European Convention of Human Rights[27] has been understood and applied by the European Court of Human Rights. According to earlier case law of that court[28] on the applicability of Art 6 to civil matters –

> '. . . proceedings before the domestic courts amount to "the determination" of an applicant's civil rights and obligations if there is a real "dispute" ("*contestation*") over these rights and obligations. The result of the proceedings in question must thus be directly decisive for such a right or obligation . . . .
>
> Therefore, Art 6 does not apply to proceedings in which only interim or provisional measures are taken prior to the decision on the merits, as such proceedings do not, as a rule, affect the merits of the case and thus do not yet involve the determination of civil rights and obligations . . . . Only exceptionally has the Court considered Art 6 to be applicable to proceedings relating to interim orders. This concerned, in particular, cases in which an interim decision in fact already partially determined the rights of the

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[27] Article 6 of the Convention, in so far as relevant, reads: '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair . . . hearing within a reasonable time by [a] . . . tribunal established by law.'

[28] Summarised by the Court sitting as a Chamber on 10 July 2007 in the application of *Dassa Foundation and Others v Liechtenstein* (Application No 696/05) at 13-14

parties in relation to the final claim . . . or in which an interim order immediately led to the institution of main proceedings deciding on the dispute in question.'

More recently, however, the European Court held[29] that it was no longer 'justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations' for the following reasons:

'(a) (I)n circumstances where many contracting states face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long lasting or permanent effects; and

(b) it was no longer convinced 'that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by art. 6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation.'[30]

The European Court, therefore, adopted a new approach:[31]

'83. As previously noted, art 6 in its civil "limb" applies only to proceedings determining civil rights or obligations. Not all interim measures determine such rights

[29] In *Micallef v Malta* (2010) 50 E.H.R.R. 37
[30] ibid, paras 79 and 80 of the judgment.
[31] Ibid, paras 83 – 86 of the judgment.

and obligations and the applicability of art 6 will depend on whether certain conditions are fulfilled.

84. First, the right at stake in both the main and the injunction proceedings should be “civil” within the autonomous meaning of that notion under art 6 of the Convention.

85. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be consideredeffectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, art 6 will be applicable.

86. However, the Court accepts that in exceptional cases - where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process - it may not be possible immediately to comply with all of the requirements of art. 6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In any subsequent proceedings before the court it will fall to the Government to establish that, in view of the purpose of the proceedings at issue in a given case, one or more specific procedural safeguards could not be applied without unduly prejudicing the attainment of the objectives sought by the interim measure in question.’

[34] Albeit for a somewhat different purpose, Ms Vivier contended that the interim order issued by the court below was not final in effect and remained susceptible to alteration by that court.[32] The interlocutory nature of the order in this matter pertinently raises the question of whether it constitutes a ‘determination’ of appellant’s civil rights

[32] She referred to a number of authorities to this effect, including: *Metlika Trading Ltd and Others v Commissioner South African Revenue Services* 2005 (3) SA 1 (SCA) paras 19 and 23; *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at 452F to 453; Van Winsen, Cilliers and Loots, *The Civil Practice of the Supreme Court of South Africa* (4 ed.) at 882 - 883.

and obligations within the contemplation of Art 12(1)(*a*). I have grave reservations - even on an application of the more recent *Micallef* approach – that it does. This is particularly so because appellant had delayed for months to assert its rights in terms of the cession of book debts and because the restrictive effect of the interim relief was of a purely financial nature and coupled to a rule *nisi* with a short return date which, in any event, could have been anticipated on 24 hours' notice. Had the rule *nisi* been discharged, the interlocutory interdict would have ceased to have any further operation.

As this point has not been argued with reference to the 'admissibility' of appellant's complaint and I have already concluded on a different basis that appellant failed to demonstrate that the proceedings before the High Court violated its constitutional right to a fair trial, I do not propose to make any formal finding on this threshold issue. It may well be a matter to be addressed by this court if and when the occasion arises in the future.

[35] It is for the reasons given earlier in this judgment that appellant's three-pronged attack (constitutional, common law and procedural) against the fairness and regularity of the proceedings in the High Court and the validity of its order must be dismissed on the merits.

[36] Had we been seized with these issues in an appeal – and appellant's counsel assures us that it is not one, regardless of the label that might have been attached to

the proceedings – I would have proposed to dismiss the appeal. As I do not propose that the Court should exercise its review jurisdiction in terms of s 16 of the Supreme Court Act, the court may also not dispose of the matter, as we would have done with a review. Since I propose to dismiss appellant's challenges on the merits, there is also no cause why this court should forge a new or different remedy to redress appellant's grievances. It, therefore, seems to me that justice will be served if this matter is struck off the roll with costs, such costs to include the costs of one instructing and one instructed counsel.

[37] There are, however, also a number of ancillary matters raised in connection with these proceedings that must be addressed, mainly because of the cost implications they have. In what follows, I shall deal with them in brief.

[38] The rule *nisi* and interlocutory relief were granted by the High Court on 15 March 2005 and the return date was set for 4 April 2005. Before the reasons of the presiding judge became available, appellant's counsel moved an application for leave to appeal to this court from the Bar. The application was only partly heard, when it had to be postponed until the next day. Due to unforeseen circumstances, the application could also not proceed on that day and had to be postponed to a date to be arranged with the registrar of the High Court. Appellant's counsel subsequently enrolled the partly heard application for hearing on 11 April 2005. This enrolment notwithstanding, appellant unexpectedly lodged a 'notice of appeal' (quoted above) with the registrar in terms whereof it gave notice that the appeal was filed 'as of right'. However, on 18

April 2005 appellant's counsel required respondent's counsel to meet at the office of the registrar ‘for the purpose of obtaining a trial date for the hearing of the partly heard application for leave to appeal’, only to serve a notice of withdrawal of the application for leave to appeal on 10 May 2005 without tendering any wasted costs in that application. In these circumstances, appellant should bear the costs of respondent occasioned by the application it initiated but later withdrew and I propose to make an order accordingly.

[39] The record of proceedings in the High Court that was lodged in this court was not complete, as it did not include a transcript of the proceedings before the High Court on 7 March 2005 when appellant's application for a postponement of the urgent application was refused. Respondent applied by notice of motion at the hearing for the record to be supplemented. Appellant did not oppose the application and tendered the costs occasioned by it.

[40] What remains is an application that the court should condone appellant's failure to lodge a power of attorney within the time period prescribed by rule 5(4)(*a*) and to deal with the consequences, if any, of appellant’s failure to lodge security as is required in appeals by rule 8. I do not propose to deal with these matters at length. Suffice it to say that the rules referred to regulate the prosecution of appeals and, inasmuch as appellant made it abundantly clear during argument that this was not an appeal, it must follow that those rules do not apply. It must be noted however, that the disavowal of the nature of the proceedings, notwithstanding the label of an ‘appeal’

having been attached to the notice by which they were initiated, happened only at the hearing in this court. Until then, respondent was entitled to proceed on the basis that appellant intended the proceedings to be an appeal in the hope that this court would assume its review jurisdiction in terms of s 16 of the Supreme Court Act, as it had in the matter of *Vaatz and Another v Klotzsch and Others.*[33] It, therefore, based its objections on the procedural permissibility of the appeal without leave of the High Court[34] and appellant's failure to comply with the rules of this court relating to appeals.

[41] In my view, respondent was quite entitled to act on the representation made by appellant about the nature of the proceedings (at least until the hearing) and appellant, therefore, should bear the costs occasioned by respondent's opposition to the condonation application.

[42] The following orders are therefore made:

1. The appeal is struck off the roll.

2. Appellant pays respondent's cost in the matter, such costs to include –

    2.1 the costs occasioned by the application for leave to appeal in the High Court;

[33] An unreported judgment of this court in Case No SA 26/2001, dated 11 October 2002.
[34] As is required by s 18(3) of the High Court Act, 1990.

2.2 the costs of respondent's application to supplement the record of the proceedings in this court;

2.3 the costs of appellant's application for condonation and any opposition thereto;

and further to include the costs of one instructing and one instructed counsel.

_____
MARITZ JA

_____
SHIVUTE CJ

_____
CHOMBA AJA

APPEARANCES:

APPELLANT:	P J v R Henning SC
	(with him R Heathcote)
	Instructed by LorentzAngula Inc
RESPONDENT:	S Vivier
	Instructed by Koep & Partner