



REPORTABLE

CASE NO: SA 101/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ENOCK KAMUSHINDA

METROPOLITAN BANK OF ZIMBABWE LIMITED

WORLD EAGLE INVESTMENTS (PRIVATE) LIMITED

First Appellant

Second Appellant

Third Appellant

and

LIQUIDATORS, SMALL AND MEDIUM

ENTERPRISES BANK LIMITED (SME BANK

IN LIQUIDATION)

Respondent

Coram: MAINGA JA, SMUTS JA, and FRANK AJA

Heard: 1 March 2024

Delivered: 13 March 2024

Summary: This appeal comes against the backdrop of the liquidation of the Small and Medium Enterprises Bank Limited (SME Bank) on 11 July 2017. The appellants, two minority shareholders the Metropolitan Bank of Zimbabwe Limited (Metbank) and World Eagle Investments (Pvt) Ltd (World Eagle), and Enock Kamushinda, chairperson of World Eagle and the former director of SME Bank in his personal

capacity brought an application in the court *a quo* against the liquidators and Bank of Namibia (BoN) for an order declaring that the closure of the SME Bank by BoN was in violation of their constitutional rights and a nullity. The application was opposed by the liquidators and BoN. The liquidators brought a counter-application against the appellants (which the appellants opposed) to rectify the members' register of the SME Bank and for Metbank and World Eagle to make their outstanding payments for their shareholding; for Mr Kamushinda to be declared liable for the liabilities of the SME Bank under s 430 of the Companies Act 28 of 2004 (the Act); for Metbank and World Eagle to be declared liable for the liabilities of the SME Bank at the date of liquidation; and for judgment against the appellants jointly and severally for the following amounts: (i) N\$1 028 286 903,13; (ii) N\$60 million; (iii) interest on these amounts at the legal rate from 12 July 2017 to date of payment; and costs. The appellants withdrew their application and opposed the liquidators' counter-application. Appellants raised preliminary points of prescription and non-joinder. The High Court proceeded to hear the counter-application and granted judgment as sought against the appellants on 29 October 2020, save for the relief sought against the appellants jointly and severally for the amount of N\$60 million which was abandoned.

In this Court, the notice of appeal against the judgment of 29 October 2020 and the record of appeal were filed timeously, on 26 November 2020 and on 28 January 2021 respectively. The bond of security was however only filed some months later, on 31 May 2021 and not in compliance with rule 14 of the Rules of the Supreme Court. Appellants brought an application for condonation for this non-compliance and reinstatement of the appeal only on 21 January 2022. The matter was initially set down for hearing on 27 March 2023.

After the matter was set down for its initial hearing on 27 March 2023, the appellants' erstwhile legal practitioner sought a postponement through a letter to the respondent's legal practitioners and to the registrar of this Court on 13 March 2023. The respondent's declined this request and on 17 March 2023, the appellants' then legal representative filed a notice of withdrawal. The respondent's representatives pointed out that the said notice failed to comply with the peremptory requirements of rule 3A of the rules of this Court. On the day of the hearing, a new legal practitioner representing the appellants appeared before court and submitted that she had not had the opportunity to consult with her clients and that she was not in a position to argue the

application for condonation and reinstatement and asked for a postponement of the matter to enable her to bring a formal application for postponement. This request was denied and the matter was struck from the roll with costs. On 22 May 2023, the appellants filed an application to reinstate the appeal and the interlocutory application for condonation and reinstatement to the roll. This application is opposed by the respondents.

The two-pronged nature of the test for condonation applications is trite and has been repeatedly stated in this Court: firstly; the applicant is required to provide a reasonable and acceptable explanation for the non-compliance and secondly; the applicant must show that there are reasonable prospects of success on appeal. These requirements are not considered in isolation in the exercise of the court's discretion. Good prospects of success may result in granting condonation even in the face of an unsatisfactory explanation although an explanation found to be 'glaring', 'flagrant' or 'inexplicable' may result in the dismissal of the application without the need to consider the prospects of success of the appeal.

With regard to the condonation and reinstatement application of 21 January 2022, there are unacceptable omissions in the appellant's founding affidavit such as the approach on December 2020 by the appellants' erstwhile practitioner to the liquidators' lawyer to waive security and significant spells of unexplained delays to have security set and to file a condonation and reinstatement application for this non-compliance. These issues are compounded by the reckless inaction on the part of the appellants' erstwhile legal practitioner and his highly questionable conduct in asserting under oath to assist his clients in their challenge to the freezing of their bank accounts in South Africa, that the appeal had not lapsed even though he asserts that he realised in November 2021 that a condonation application was required.

Held that, the appellants have displayed a distinct lack of diligence and attention to compliance with this Court's rules. The explanation provided for the delay in bringing the condonation application is weak and inadequate as well as being entirely unsatisfactory. *Held that*, the principles laid down in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) find application in this matter that 'the inadequate explanation for the delay is ameliorated by weighty factors which militate against the refusal' of condonation on the basis of the

inadequacy of the explanation alone. The explanation provided for the subsequent application for reinstatement was also inadequate and unsatisfactory.

Held that, there are weighty factors present in this matter, given the public interest nature of the matter concerning the substantial claims arising from the liquidation of a registered bank and the accountability of a director in respect of substantial sums which went missing from that bank, causing its collapse. These claims should be brought to finality. It is also clear, particularly following the unexplained unsatisfactory termination of appellant's subsequent legal practitioner's representation – that the unacceptable conduct was not only on the part of the lawyers but also on the part of the appellants given the circumstances surrounding their subsequent lawyer's withdrawal.

Held that, despite the inadequacy of the explanation, the court considered this matter's prospects of success in order to bring this matter to finality, despite the cumulative effect of the unexplained delays reaching the level of being glaring and flagrant. The court accordingly heard full argument on the merits of the appeal, given the public importance of the claims arising from the collapse of SME Bank, the extent of loss for depositors, the extent of missing funds and the need for accountability, and the need for finality on the issues raised by the appeal and whether there should be a referral of the entire matter to the Prosecutor-General.

Held that, on the merits the appellants' papers in answering to the counter-application are replete with bald denials. These unsupported and bare denials are not sufficient to raise a material dispute of fact, especially in the face of the very detailed evidence backed by compelling documentary evidence properly confirmed under oath by senior bank officials and other relevant witnesses.

Held that, Mr Kamushinda left Namibia after 17 February 2017, shortly before BoN took over the management and control of SME Bank on 1 March 2017. Mr Kamushinda has remained outside Namibia since then – as a result, prescription has not completed by virtue of s 13(1)(l) of the Prescription Act 69 of 1969. The same applies to foreign companies which do not have a place of business in Namibia.

The court *a quo* was correct to find that the claim for rectification of the share register is not a debt for the purposes of the Prescription Act.

Held that, the joining of the Namibia Finance Trust was not necessary for the claims for shareholder contribution and under s 72 of the Act. Nor was it necessary to do so in respect of the claim under s 430 against Mr Kamushinda as the Apportionment of Damages Act 34 of 1956 provides that it is not necessary to join all wrongdoers in an action.

Held that, the condonation and reinstatement application filed on 21 January 2022 and set down for hearing on 29 March 2023 and the reinstatement application brought on 29 May 2023 both fail comprehensively to establish both components of good cause required for condonation and reinstatement. They both lack a satisfactory explanation and it is clear that the appellants' appeal bears no prospects of success. Those applications fall to be dismissed.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and FRANK AJA concurring):

Litigation history

[1] These proceedings arise from the liquidation of the Small and Medium Enterprises Bank Limited (SME Bank), which was placed under provisional liquidation on 11 July 2017. That order was made final on 29 November 2017 and an appeal against it to this Court was effectively dismissed on 23 August 2018.¹

[2] The respondents in this appeal are the liquidators of SME Bank (in liquidation). They, together with other respondents, were cited in a High Court application by the appellants, the two minority shareholders in SME Bank, Metropolitan Bank of Zimbabwe Limited (Metbank) and World Eagle Investments (Pvt) Ltd (World Eagle),

¹ *Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia* 2018 (4) NR 1115 (SC).

and Enock Kamushinda, chairperson of World Eagle and a former director of SME Bank in his personal capacity.

[3] The appellants approached the High Court for an order declaring that the closure of SME Bank by the Bank of Namibia (BoN) was in violation of their constitutional rights and a nullity. Consequent upon this declaratory relief, they sought an order declaring that all actions taken by BoN are void and further sought an order that BoN account to and refund shareholders for money spent by SME Bank relating to the winding up.

[4] This application was opposed by certain respondents including the liquidators and BoN. The liquidators' answering affidavit also formed the basis for a counter-application which they brought against the appellants, seeking the following relief against the appellants:-

- '(a) Rectifying the members' register of SME Bank to reflect its members as at 3 September 2012 as being:
 - (i) Namibia Finance Trust (an association incorporated not for gain) as holding 65% of the issued shares;
 - (ii) Metbank as holding 30% of the issued shares; and
 - (iii) World Eagle as holding 5% of the shares.

- (b) That Mr Kamushinda be declared liable for the liabilities of SME Bank under s 430 of the Companies Act 28 of 2004 (the Act);

- (c) Declaring that Metbank and World Eagle be declared liable for the liabilities of SME Bank at the date of liquidation, 11 July 2017;

- (d) Judgment against the appellants jointly and severally for the following amounts:

- (i) N\$1 028 286 903,13;
- (ii) N\$60 million;
- (iii) Interest on these amounts at the legal rate from 12 July 2017 to date of payment; and

(e) Costs.'

[5] After the counter-application was filed, the appellants sought to withdraw their application. The liquidators accepted the withdrawal subject to the payment of their costs and the withdrawal not being regarded as permitting the appellants to revoke their submission to the jurisdiction of the High Court. (The two appellant companies are registered in Zimbabwe and Mr Kamushinda is a Zimbabwean national and not domiciled within the jurisdiction of the High Court).

[6] The High Court proceeded to hear the counter-application on 12 and 13 August 2020 and granted judgment as sought against the appellants on 29 October 2020, save for prayer d(ii) which was abandoned.

The proceedings in this Court

[7] The appellants timeously filed a notice of appeal against the judgment on 26 November 2020. The record was also timeously lodged on 28 January 2021 but a bond of security was only filed on 31 May 2021. The appellants are required by rule 14(3) to inform the registrar on the date when the record is lodged that security has been entered. A failure to inform the registrar to this effect within 21 days from that date is deemed to be a failure to comply with the relevant subrule. The appeal thus lapsed in early 2021 – either on 28 January 2021 or the expiry of 21 days from that date. The appellants thus brought an application for condonation and reinstatement of the appeal but only did so on 21 January 2022.

[8] The matter was set down for hearing on 27 March 2023.

[9] Shortly before the hearing and on 13 March 2023, the appellants' then legal practitioner of record, Mr Bangamwabo, forwarded a copy of correspondence directed to the liquidators' legal representatives and to the registrar in which a request was made to agree to the postponement of the hearing, failing which a postponement application would be launched. The liquidators' lawyers responded on the following day declining to agree to a postponement.

[10] A few days later, and on 17 March 2023, the appellants' erstwhile practitioner filed a notice of withdrawal of representation.

[11] On 23 March 2023, the liquidators' legal practitioners pointed out to the appellants' erstwhile representative that the notice of withdrawal failed to comply with the peremptory requirements of rule 3A of the rules of this Court. These requirements include providing the following details of the appellants as set out in rule 3A(4):

'(A) The return referred to in subrule (1) must contain the following information about the party whether the party is represented by a legal practitioner or not –

...

(c) if the party is a Namibian citizen not ordinarily resident in Namibia or is any other person not ordinarily resident in Namibia, provide his or her –

- (i) physical address in the country where he or she ordinarily resides;
- (ii) an email address, if available;
- (iii) postal address;

- (iv) telephone or cellular phone number or both;
- (v) workplace telephone number or facsimile number; and
- (vi) personal or workplace email address or both;

...

(e) in the case of a company registered in terms of the Companies Act, 2004 (Act No. 28 of 2004) in Namibia, provide –

- (i) its name and registered number, postal address and registered office referred to in section 178 of that Act;
- (ii) the particulars referred to in paragraphs (a) and (b) of at least one director and the secretary referred to in section 223 of that Act including all particulars referred to in section 223(1) of that Act; and
- (iii) in case of the officer or secretary of any other body corporate, the particulars referred to in paragraph (b) of section 223(1) of that Act;

...

(g) in the case of any other non-Namibian juristic person including a company, corporation, enterprise, agency, firm, business, institution registered in a country other than Namibia, provide –

- (i) the particulars referred to in paragraph (a) of at least one director, member, officer or secretary or a person running its affairs; and
- (ii) the particulars referred to in paragraphs (d) or (e), as applicable.’

[12] Those particulars have not been provided to date.

[13] On 24 March 2023 a legal practitioner, Ms Nyatondo, filed a notice of representation for the appellants and appeared at the hearing on 27 March 2023. On that occasion, Ms Nyatondo informed the court that she had only recently come on

record for the appellants and had not had the opportunity to consult with them. The practitioner further stated that she was not in a position to argue the application for condonation and reinstatement and asked for a postponement of the matter to enable her to bring a formal application for postponement of the matter.

[14] This request was declined by the court which struck the matter from the roll with costs. This occurred in the presence of the appellants' then legal practitioner, Ms Nyatondo.

[15] On 22 May 2023, the appellants filed an application to reinstate the appeal (and the interlocutory application for condonation and reinstatement) to the roll.

[16] In support of this application, Ms Nyatondo refers to the appellants' erstwhile legal practitioner's withdrawal shortly before the prior hearing date (27 March 2023) and instructed senior counsel's apparent inability to attend the proceedings and the fact that she came on record very shortly before the hearing and was not in a position to argue the matter.

[17] Ms Nyatondo contends that the appellants cannot be blamed for these circumstances which led to the matter being struck from the roll. This is, in essence, the explanation tendered for the matter being struck and for seeking its reinstatement.

[18] This application is opposed by the liquidators. An unduly lengthy answering affidavit is filed on their behalf. Its annexures are quoted extensively and at times in full as part of the text of the affidavit whilst the annexures are also attached to it. This form

of drafting results in an unnecessarily lengthy affidavit and needless repetition and is further referred to below.

[19] In the answering affidavit, the point is taken that the appellants unduly delayed in bringing it, given the absence of an explanation for the delay from 27 March 2023 to 22 May 2023 before doing so.

[20] It is also stated that the application is ill-conceived as there is no pending appeal as the appeal had lapsed following the failure to comply with rule 14.

[21] It is also contended that the reasons for the matter being struck do not constitute a basis for an application for reinstatement.

[22] The liquidators also question the *bona fides* of the application and submit that it amounts to an attempt to enable the appellants to contend (falsely) in other jurisdictions that there is an appeal still pending in this Court. As I have already pointed out, the appeal lapsed in early 2021.

[23] In the answering affidavit there is also reference to developments following judgment in the High Court and the striking of the matter on 27 March 2023. It is not necessary for the purpose of this judgment to refer to those developments.

[24] In order to succeed with this application to reinstate the matter to the roll, the explanation provided for the matter being struck from the roll is to be considered together with the prospects of success in respect of the matter sought to be reinstated.

[25] What was struck from the roll on 27 March 2023 was the application for condonation and reinstatement of the appeal arising from the failure to comply with rule 14. The prospects of success of that application concern the adequacy of the explanation provided and the prospects of success on appeal.

[26] The explanation tendered for the striking of the matter from the roll has two components. The first is the apparent unavailability on the date of senior counsel as conveyed in correspondence directed to the liquidators' practitioners just over two weeks before the hearing. The second is the subsequent withdrawal of the appellants' then legal practitioner of record on 17 March 2023, 12 days before the hearing.

[27] In respect of the first component, no particularity is provided except to say that the reason for senior counsel's unavailability was on account of 'family reasons'. No explanation is provided as to why junior counsel could not present the argument in court. (Written argument by senior counsel was timeously filed and the names of both senior and junior counsel appear on supplementary heads of argument dated 20 February 2023).

[28] As for the second reason provided, the withdrawal is not only unexplained but is not in compliance with the rules of this Court inasmuch as the returns required by rule 3A in peremptory terms were not provided.

[29] No heads of argument, due on 31 January 2024, were provided in respect of this application for reinstatement in accordance with rule 17 of the rules of this Court.

[30] After this was pointed out to Ms Nyatondo by the liquidators' legal practitioners on 5 February 2024, Ms Nyatondo withdrew as legal practitioner of record for the appellants on 7 February 2024. No adequate explanation is provided for her withdrawal which was also not in accordance with the rule 3A of the rules of this Court. In correspondence exchanged between the legal practitioners, provided to this Court, Ms Nyatondo states that the termination of her mandate occurred by way of an email in the name of Victori Legal (and not any party) dated 22 January 2024 to the following effect:

'Following Francois' mandate termination to represent Metbank and others (as attached), it then follows that your mandate is subsequently terminated given the relationship you have with Francois'.

[31] The reference to Francois is to Mr Bangamwabo. Attached to the email is an email addressed to Mr Bangamwabo dated 16 August 2023 on Metbank's letterhead by its Executive Director: ICT & Consumer Banking, confirming the termination of his mandate to represent it and the other appellants following Mr Bangamwabo's notice of withdrawal dated 17 March 2023.

[32] In view of the history of this matter, this Court heard argument concerning the applications for reinstatement and condonation including on the merits of the appeal, given the dual test for condonation and reinstatement requiring a satisfactory explanation and that an appeal enjoys prospects of success. Counsel for the liquidators sought the dismissal of both applications with costs on a special scale as well as an order requiring that the appellants provide security for payment of certain of the judgment debts before launching any new application for condonation and reinstatement of the appeal.

[33] The inadequacy of the explanation tendered for the matter being struck from the roll is compounded by the tardiness in bringing this application some two months later. There is the mere assertion by Ms Nyatondo that the application was brought 'with reasonable promptitude' without tendering an explanation as to why it took some two months to lodge.

[34] When challenged in the answering affidavit in this regard, Ms Nyatondo merely states in reply that she needed to acquaint herself with the facts and circumstances of the matter and that the appellants are based in foreign jurisdictions. No specificity is provided in either respect as to how and in what respect the delay occurred.

[35] In a reinstatement application of this kind, a full, reasonable and adequate explanation is required as to why the matter was struck and why reinstatement should be granted. That is singularly lacking in this matter. The explanation provided is wholly inadequate and unsatisfactory. Despite the glaring inadequacy of the explanation, the court proceeded to hear argument on the merits of this application and in the context of the appellants' unexplained termination of the mandate of their representatives on the eve of the two set downs granted by this Court as well as hearing argument on the merits of the appeal, given the dual requirement for condonation and reinstatement.

[36] I accordingly turn to what was struck from the roll on 27 March 2023.

Application for condonation and reinstatement struck from the roll on 27 March 2023

[37] In support of their application for condonation for the late filing of security, the appellants state that their then legal practitioner, Mr Bangamwabo, on 21 January

2021 filed a notice seeking a determination by the registrar of the amount to be provided as security for costs of the appeal. A hearing was requested and on 19 February 2021 the registrar designated 26 February 2021 for that hearing. The amount was set at N\$300 000 by the registrar on that date and set out in a notice to that effect on 5 March 2021.

[38] The appellants state that it was practically impossible for them to provide security by the due date of 28 January 2021 because the amount was only determined by the registrar in a notice dated 5 March 2021.

[39] The appellants state that they then set about making arrangements to secure the funds from Zimbabwe to South Africa and then to Namibia. This was done and a bond of security was provided by their local legal practitioner on 31 May 2021. The next date provided is merely referred to as 'during or about November 2021' when the appellants' legal practitioner advised them of the need to apply for condonation. On 10 January 2022 counsel was then engaged to prepare an application which was done by 19 January 2022 and filed on 21 January 2022.

[40] The condonation application is opposed by the liquidators. They point out that already on 14 December 2020, they declined a request made on the appellants' behalf to waive security and simultaneously demanded the sum of N\$800 000 as security on that date. This correspondence is not referred to by the appellants. The appellants' erstwhile legal practitioner responded over a month later on 18 January 2021 with a counter offer of N\$150 000 which was rejected by the liquidators on 20 January 2021. It is further stated that security was in fact set on 26 February 2021 by the registrar in the sum of N\$300 000 even though the notice confirming this was issued on 5 March

2021. The liquidators further point out that there is no explanation for the delay which ensued from 26 February 2021 to 31 May 2021 until the security was provided, except for the appellants stating that the process of arranging finance started after 5 March 2021.

[41] The appellants also did not refer to a letter dated 28 May 2021 sent by the liquidators' lawyer recording that the failure to provide security under rule 14 meant that the appeal had lapsed and that the order of the High Court was as a result, executable. This was disputed by the then appellants' legal practitioner in a letter of 31 May 2021. The liquidator's legal practitioner responded in more detail on 4 June 2021 with reference to applicable authority of this Court, pointing out that the appeal had lapsed.

[42] The liquidators thereafter secured the registration of the High Court judgment as a foreign civil judgment with a competent court in South Africa on 26 November 2021. The registration process was served on Mr Kamushinda and Metbank at addresses in Johannesburg and served on commercial banks in South Africa in early December 2021. Certain of Metbank's banking accounts were frozen as a consequence. An urgent application was launched by it for the release of the frozen funds. It was contended on their behalf that the order of the High Court was suspended by the appellants' appeal. The liquidators in opposition pointed out that the appeal had lapsed and attached the correspondence pointing this out to appellants' erstwhile legal practitioner, Mr Bangamwabo. In reply, Mr Bangamwabo under oath confirmed a statement attributed to him to the effect that he had been informed by the registrar of this Court that the appeal had not lapsed and that a date of hearing would be communicated to the parties early in the new year (of 2022) and would be around

mid-2022. Mr Bangamwabo himself added that the assertion that the appeal had lapsed was 'false, disingenuous and intended to mislead the (South African) court'.

[43] The liquidator's legal practitioner enquired from Mr Bangamwabo as to which assistant registrar he had spoken to, seeing that four of the five assistant registrars denied communicating with Mr Bangamwabo and the fifth was on leave from 22 December 2021. This request was not answered although a name is provided in reply.

Principles governing condonation

[44] The two-pronged nature of the test for condonation applications has been repeatedly stated by this Court, given the disturbing frequency of applications of this nature directed to this Court.

[45] An applicant for condonation is firstly required to provide a reasonable and acceptable explanation for the non-compliance. In the second instance, there must be reasonable prospects of success on appeal. These requirements are not considered in isolation in the exercise of the court's discretion. Good prospects of success may result in granting condonation even in the face of an unsatisfactory explanation although an explanation found to be 'glaring', 'flagrant' or 'inexplicable' may result in the dismissal of the application without the need to consider the prospects of success of the appeal.²

[46] As was held by the Chief Justice in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others*:³

² *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another* 2020 (1) NR 19 (SC) para 13.

³ *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) para 19.

'In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.'

[47] In this matter, there are unacceptable omissions in the founding affidavit such as the approach on December 2020 by the appellants' erstwhile legal practitioner to the liquidators' lawyer to waive security and the prompt response to it on 14 December 2020 containing a counter proposal for security – albeit exorbitant – and the omission of correspondence around the end of May 2020 correctly pointing out that the appeal had lapsed because of the failure to provide security.

[48] There are also significant spells of unexplained delays. There is absolutely no action from 14 December 2020 until the further offer by the appellants' then legal practitioner on 21 January 2021, only days before security was due.

[49] Certain steps at least then followed with some promptitude to have security set on 26 February 2021. But there then follows a long unexplained delay of three months before the security is filed on 31 May 2021 and then only after steps are threatened to execute the judgment and after it is pointed out that the appeal had lapsed.

[50] There follows an unexplained delay until an unspecified date in November 2021 when the appellants' erstwhile legal practitioner states that he became aware of the need to file a condonation application after claiming to have spoken to an assistant

registrar of this Court. This realisation is insufficiently explained in the context of the correspondence setting out the applicable case law on the issue some six months previously. But the application for condonation is only forthcoming some two months later on 21 January 2022. This further period of delay is also unexplained.

[51] Not only are these unexplained delays entirely unsatisfactory, but the conduct of the appellants' then legal practitioner Mr Bangamwabo calls for an explanation with regard to his persistent failure to appreciate the need for an application for condonation and reinstatement even after that has repeatedly been pertinently pointed out to him, with reference to both the applicable rule of court and decided cases of this Court. The reckless inaction on the part of Mr Bangamwabo is compounded by his highly questionable conduct in asserting under oath to assist his clients in their challenge to the freezing of their bank accounts, that the appeal had not lapsed even though he says he realised in November 2021 that a condonation application was required. This aspect should be investigated by the Disciplinary Committee for Legal Practitioners. The registrar is directed to provide a copy of this judgment to that body for that purpose, together with a set of the affidavits filed in the condonation application.

[52] The appellants have displayed a distinct lack of diligence and attention to compliance with this Court's rules. The explanation provided for the delay in bringing the condonation application is weak and inadequate as well as being entirely unsatisfactory.

[53] As in *Namib Plains*, the question whether the appellants should be penalised because of the unacceptable lack of diligence on the part of their erstwhile legal

practitioner, Mr Bangamwabo as well as their subsequent legal practitioner, Ms Nyatondo, who also withdrew on the eve of this hearing. As was reiterated in *Namib Plains*, there is a limit beyond which a litigant cannot escape its legal practitioner's remissness.⁴ In *Namib Plains*, it was stated that 'the inadequate explanation for the delay is ameliorated by weighty factors which militate against the refusal'⁵ of condonation on the basis of the inadequacy of the explanation alone. In this matter there are also weighty factors present, given the public interest nature of the matter concerning the substantial claims arising from the liquidation of a registered bank and the accountability of a director in respect of substantial sums which went missing from that bank, causing its collapse. These claims should be brought to finality. It is also clear, particularly following the unexplained unsatisfactory termination of Ms Nyatondo's representation, that the unacceptable conduct was not only on the part of the lawyers but also on the part of the appellants given the circumstances surrounding her withdrawal.

[54] Despite the inadequacy of the explanation, there will thus also be a consideration of the prospects of success in order to bring this matter to finality, even though the cumulative effect of the unexplained delays approaches the level of being glaring and flagrant. The court accordingly heard full argument on the merits of the appeal, given the public importance of the claims arising from the collapse of SME Bank, the extent of loss for depositors, the extent of missing funds and the need for accountability, and the need for finality on the issues raised by the appeal and whether there should be a referral of the entire matter to the Prosecutor-General. In doing so, the court also had the benefit of full written argument on the merits of the appeal filed

⁴ Para 25.

⁵ Para 25.

timeously by the appellants' erstwhile senior counsel prior to the first abortive hearing on 27 March 2023.

[55] Before leaving this condonation application, it is again necessary to say a word on affidavits. The liquidators' answering affidavit to the appellants' 11 page founding affidavit runs into 47 pages with more than a hundred pages in annexures. Included in the annexures is the High Court judgment appealed against which is 53 pages in length. That judgment of course forms part of the papers before us. It was completely unnecessary to attach it. Of the 47 page answering affidavit, nearly half (exceeding 22 pages) comprises lengthy correspondence incorporated in full and lengthy quotations from the judgment, all of which are also annexed to the affidavit. This amounts to an abuse. This form of abuse was also evident in opposition to the subsequent application for reinstatement, as I have already said. The answering affidavit to that application also contained long quotations from and in some instances the full text of correspondence in the body of the affidavit whilst also attaching the correspondence in question as annexures each time. This practice caused that affidavit to become unnecessarily lengthy.

[56] Affidavits are after all there in application proceedings to place evidence before the court and to define the issues between the parties. The parties must know the case which is to be met by raising issues and the evidence which they rely upon. This is to be done with precision and facts are to be set out 'simply, clearly and in chronological sequence and without argumentative matter'.⁶ As was stressed in *Swissborough*, it is not open to a party to annex documents and request the court to have regard to them without identifying which portions are relied upon.⁷ By the same

⁶ *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 323-324.

⁷ At 324G-H and the authorities collected there.

token, it is certainly unduly burdening papers to annex correspondence and a judgment and proceed to incorporate the full terms of lengthy annexed correspondence and portions of the judgment in the text of an affidavit. This is a practice which must cease. It serves to overburden already voluminous proceedings and unnecessarily inflates costs. This Court's displeasure at this practice is reflected in the cost order relating to this condonation application.

Merits of the counter-application

[57] At issue in the appeal sought to be reinstated is the liquidators' counter-application. I have already set out the relief sought and what was granted in the counter-application. The liquidators set out detailed factual material both in the body of the affidavit supporting it and in several volumes of annexures of documentary evidence attached to it. Parker AJ, in the court *a quo* addressed each claim in detail in his thorough judgment, setting out the facts established in and necessary for each claim, the appellants' opposition, the applicable legal principles and provisions and his conclusions. It is accordingly not necessary to set out the claims in detail, given the detail provided in the High Court's judgment.

[58] In opposition to the counter-application, the appellants raised certain preliminary points against the relief sought. In the first place they disputed the jurisdiction of the High Court as *peregrini*. This point was rightly dropped in senior counsel's written submissions on their behalf because they had after all submitted to the jurisdiction of the High Court in bringing their application against the liquidators.

[59] The appellants also took the point that the claims against them had prescribed.

[60] The point was also raised that there was a material dispute of fact in respect of relief sought which the liquidators should have anticipated and that certain of the claims were not competent to pursue in motion proceedings. Given the fact that the appellants disputed much of the factual matter, in the absence of a referral of the counter-application to oral evidence, they contended that the High Court ought to have dismissed the counter-application.

[61] The appellants' papers in answer to the counter-application are however replete with bald denials. These unsupported and bare denials are not sufficient to raise a material dispute of fact, especially in the face of the very detailed evidence backed by compelling documentary evidence properly confirmed under oath.

[62] The court below correctly characterised the appellants' denials as bare and unsupported and correctly concluded that they do not give rise to genuine disputes of facts.

Prescription?

[63] The appellants raised the defence of prescription in respect of the claim against Mr Kamushinda under s 430 of the Companies Act 28 of 2004 (the Act) as well as the claims for the payment of sums by Metbank and World Eagle under s 72 of the Act.

[64] Counsel for the liquidators point out that the facts upon which the claim against Mr Kamushinda (under s 430) is based were only discovered by them during November 2018 after the establishment of a commission of enquiry on 16 February 2018 which commenced on 18 March 2018. Prescription would thus only commence to run in November 2018 or upon liquidation on 11 July 2017.

[65] It is common cause that Mr Kamushinda left Namibia shortly after 17 February 2017, shortly before BoN took over the management and control of SME Bank on 1 March 2017. Mr Kamushinda has remained outside Namibia since then. As a result, the prescription has not completed by virtue of s 13(1)(f) of the Prescription Act 68 of 1969 (Prescription Act). The same applies to foreign companies which do not have a place of business in Namibia.

[66] As for the claims against Metbank and World Eagle, it is also common cause that the High Court did not have jurisdiction over them in respect of claims sounding in money until they submitted to the jurisdiction of the High Court when launching their application against the liquidations and others against which the liquidators brought their counter-application. Prescription would thus only run from the submission to jurisdiction which occurred much less than three years before the claims against them were made in the counter-application. The High Court correctly held that a claim for rectification of the share register is not a debt for purposes of the Prescription Act.

[67] The court below correctly rejected the pleas of prescription raised by the appellants.

Non-joinder

[68] In written argument prepared on their behalf, the appellants also take the point that in respect of the claim against Mr Kamushinda under s 430, other joint wrongdoers (other directors of SME Bank) were not joined and that in respect of the

claim under s 72 only Metbank and World Eagle were sought to be held liable to the exclusion of the other shareholder, Namibia Finance Trust (NFT).

[69] As to the first point, the Apportionment of Damages Act 34 of 1956 makes it plain that it is not necessary to join all wrongdoers in an action.

[70] In respect of the claim under s 72, the liquidators secured a letter from the Trustee of Namibia Entrepreneurial Development Trust (which succeeded to NFT) that he abided the High Court's order of 29 October 2022 and waives the right to be joined to these proceedings.

[71] It is also apparent from the wording of s 72 that it does not require joinder.

[72] I turn to deal with the specific claims.

Rectification of the members' register

[73] In support of the claim for rectification of the members' register under s 122 of the Act, the liquidators set out the history preceding the establishment of SME Bank which spanned a considerable period. Shortly stated, Metbank and World Eagle represented by Mr Kamushinda were closely involved in developments which led to the setting up of SME Bank.

[74] Relevant for present purposes is that SME Bank was licenced as a bank by BoN on 30 November 2012. BoN approved only a five per cent shareholding for World Eagle and eventually approved a 30 per cent holding for Metbank. The remaining 65 per cent of the shares was to be held by the Government of the Republic of Namibia

through a corporate entity, the NFT (an association incorporated not for gain). It was to be the corporate vehicle to be used by government though there was also reference to NFT (Pty) Ltd being used for that purpose.

[75] The liquidators assert that Metbank became a 30 per cent shareholder in SME Bank as of 3 September 2012. Some time after this date, it is asserted on behalf of Metbank that it 'resigned' as a shareholder. That is however not competent but nothing turns on this as Metbank was subsequently approved by BoN as a 30 per cent shareholder on 15 July 2015.

[76] Metbank acted upon that approval and accepted its shareholding at that level until the liquidation. Indeed, the liquidation application was opposed by it on the basis of it being a 30 per cent shareholder and by World Eagle in its capacity as a five per cent shareholder. The appellants' application in the High Court in these proceedings was brought on the very basis of this shareholding as is confirmed under oath by Mr Kamushinda in the founding affidavit. Despite this, erstwhile counsel for the appellants asserted in written argument that there was no lawful holding of shares in SME Bank at the time it was liquidated. This submission is to be roundly rejected. It flies in the face of his own clients' position under oath in the proceedings and in their opposition to the SME Bank's liquidation as well as their position throughout as to being shareholders in the proportions set out by the liquidators.

[77] What is however common cause is that share certificates were not issued to the respective shareholders prior to liquidation. In the founding affidavit to the counter-application, it is stated that all the necessary cession agreements were entered into in order to transfer the shares to the shareholders and that they became owners of the

shares. It is stated on behalf of the liquidators that the three members and shareholders paid the par value of their respective shares to SME Bank and that the register should thus reflect that shareholding and also to give effect to the Banking Institutions Act 2 of 1998 and the Bank of Namibia Act 15 of 1997.

[78] It is further stated that nothing prevented them to take necessary steps to obtain proof of their ownership by obtaining their certificates and that the shares were transferred without the need for share certificates. Reference is also made to SME Bank's 2015 annual financial statements where the shareholding is reflected, as contended for by the liquidators. The liquidators thus sought rectification of the register of members to reflect that under s 122 of the Act.

[79] These statements are met with bald denials by the appellants in answering to the counter-application. In written argument prepared on their behalf, the point is taken that a case for rectification was not properly made out and that the order should not have been retrospective. The point was also taken that the claim for rectification had been unduly delayed.

[80] The High Court referred in detail to the factual background to the claim for rectification including the appellant's own statements under oath confirming the shareholding contended for in the claim for rectification. The court concluded that the facts put up by the liquidators cumulatively viewed constituted equity justifying the rectification of the register in accordance with the Act. The retrospective date for that rectification was in accordance with the facts which were not properly disputed. Those conclusions are unassailable. The court in its reasoned judgment also correctly found that the liquidators had not unduly delayed bringing the claim for rectification.

[81] The appeal against the rectification of the members' register is devoid of any merit.

Shareholders' contributions

[82] The liquidators further state that there were outstanding contributions as share premiums which Metbank and World Eagle undertook and were required to make to SME Bank since 1 March 2015. They are in the sums of N\$121 463 077 and N\$20 243 846 respectively. The liquidators sought and were granted an order to that effect.

[83] This statement is likewise met with a bare denial. On the other hand, the evidence as to these outstanding contributions is set out in detail by Ms Magda Nel, SME Bank's external auditor, with reference to detailed contemporaneous documentary evidence that such contributions were outstanding and with reference to undertakings to pay them and that they remained unpaid, which evidence was not properly challenged.

[84] The appeal against the order against Metbank and World Eagle to pay their shareholder contributions of N\$121 463 077 and N\$20 243 846 respectively is likewise without merit.

Order declaring Metbank and World Eagle liable for SME Bank liabilities

[85] The liquidators also point out that the SME Bank was at all times a registered public company and that representatives of Metbank and World Eagle were aware of the fact that SME Bank had less than seven members in conflict with s 37 of the Act.

[86] This section provides:

'Any seven or more persons, where the company to be formed is a public company, or any two or more persons, where the company to be formed is a private company, or any one person, where the company to be formed is a private company with a single member, may, for any lawful purpose, form a company having a share capital or a company limited by guarantee and secure its incorporation by complying with the requirements of this Act in respect of the registration of the memorandum and articles.'

[87] The liquidators accordingly claim that Metbank and World Eagle be declared liable for the liabilities of SME Bank at the date of liquidation, 11 July 2017, by virtue of s 72 of the Act.

[88] Section 72 in turn provides:

'If any public company other than a wholly owned subsidiary carries on business for more than six months while it has less than seven members, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is so carrying on business, is liable for the payment of the whole of the debts of the company contracted during that time and may be sued for the same without any other member being joined in the action.'

[89] The liquidators state that the contracted liabilities as at 11 July 2017 amounted to N\$1 028 286 903,13 in respect of depositors and a further N\$60 000 000 in respect of a promissory note issued to JM Busha. These liabilities are supported by detailed evidence.

[90] In written argument filed on behalf of the appellants, it is contended that s 37 of the Act contemplates that the seven or more persons referred to are natural and not juristic persons. It is thus submitted that the High Court erred in making an order that Metbank and World Eagle are liable for the debts of SME Bank because they are not natural persons.

[91] No authority was provided in support of this contention. This is not surprising. It flies in the face of logic. There is no basis for reading in a limitation of that nature into the section. It falls to be rejected on first principles of statutory interpretation and the definition of 'person' contained in the Interpretation of Laws Proclamation 37 of 1920.

[92] The appeal against the order granted to this effect is also without any merit.

Liability of Mr Kamushinda under s 430 of the Act

[93] As to the claim against Mr Kamushinda under s 430 of the Act, the liquidators point out that he was closely involved in the establishment of the SME Bank and was a director of the bank since its inception on 23 March 2011 until its demise on 11 July 2017. He was also elected as deputy chairperson of the board as from 11 October 2012, a position he held until its demise and in fact served as acting chairperson for the period 30 April 2015 to 1 September 2015. In his capacity as a director, he chaired its board credit committee and was also a member of its board audit committee.

[94] Section 430 provides:

- '(1) If it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for

any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in that manner, is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

- (2) Where the Court makes the declaration contemplated in subsection (1), it may give any further directions for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him or her, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or her or any company or person on his or her behalf or any person claiming as assignee from or through the person liable or any company or person acting on his or her behalf, and may from time to time make any further orders which may be necessary for the purpose of enforcing any charge imposed under this subsection.
- (3)
- (4) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in that manner commits an offence and is liable to a fine which does not exceed N\$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.
- (5) This section has effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.'

[95] This is a punitive remedy under which a director can be held personally liable for the liabilities of a company without proof of a causal connection between the fraudulent or reckless conduct of the companies' business and those liabilities.⁸ This

⁸ *Philotex (Pty) Ltd & others v Snyman & others; Braitex (Pty) Ltd & another v Snyman & others* 1998 (2) SA 138 (SCA) at 143A-D.

section can also give rise to criminal liability. Section 430(4) provides that without prejudice to any other criminal liability incurred, where any business of a company is being carried on recklessly or with the intent to defraud creditors of a company or any other person or for any fraudulent purpose, every person who was knowingly party to that commits an offence.

[96] The precursor of this section, s 424 of the previous Companies Act 61 of 1973, is cast in strikingly similar terms.

[97] The two key elements to establish civil liability under s 430(1) are recklessness or an intention to defraud in the conduct in question and that the defendant 'knowingly engaged in it'.⁹ Two of the key concepts were explained in the context of s 430's predecessor by Howie, JA in *Philotex* in these terms:

"Knowingly" means having knowledge of the facts from which the conclusion is properly to be drawn that business of the company was or is being carried on recklessly; it does not entail knowledge of the legal consequences of those facts: *Howard's* case at 673I-674A. It follows that knowingly does not necessarily mean consciousness of recklessness. Being party to conduct of the company's business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business: *Howard's* case at 674H.

As far as "recklessly" is concerned its meaning, to which the meaning of "recklessness" corresponds, has been the subject of many reported judicial pronouncements. It suffices to refer to the following. In *Shawinigan v Vokins and Co Ltd* [1961] 3 All ER 396 (QB) at 403F it was said that "recklessness" means "grossly careless" and that recklessness is "gross carelessness" – the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as "reckless".¹⁰

⁹ *Triptomania Twee (Pty) Ltd & others v Connolly & another* 2003 (3) SA 558 (C) at 562E-F.

¹⁰ *Philotex* at 143A-C.

[98] The factual basis for this claim against Mr Kamushinda is set out in intricate detail in the counter-application and followed an intense investigation by forensic experts of the computers utilised by SME Bank prior to its liquidation and by financial forensic experts tracing the movement of funds from SME Bank. This exercise was conducted after the liquidators had successfully applied for the establishment of a commission of enquiry in terms of s 423 read with s 424 of the Act and conducted that enquiry. They subsequently applied for recognition as liquidators in South Africa and established a similar enquiry there.

[99] As a result of these investigations and the enquiries, the liquidators were able to establish that a total N\$ 247 535 004 was stolen from the funds held by SME Bank to entities mostly based in South Africa. The large scale misappropriation of SME Bank funds was, according to the compelling evidence provided by the liquidators, perpetrated by Mr Kamushinda and identified individuals who were employed in the finance department of the SME Bank, all of whom were, like Mr Kamushinda, Zimbabwean nationals. The *modus operandi* of this large scale theft and fraudulent conduct is set out in detail together with supporting documentation in the counter-application.

[100] The detailed documentation comprising financial records and bank statements, records of transactions, damning computer inscriptions and other documentary proof is confirmed under oath by a former senior officer of SME Bank and senior officers of commercial banks which had processed transactions. This evidence is essentially met with bare denials and is thus not properly challenged by Mr Kamushinda.

[101] The liquidators also provided evidence that some of this misappropriated money was in turn transferred by electronic bank transfers to corporate entities, namely Crown Finance Corporation (Pty) Ltd (Crown) and Heritage Investments (Pty) Ltd which were owned or controlled by Mr Kamushinda. In addition, several cash deposits were made in Crown's banking account exceeding a total of N\$3 million from cash withdrawn from SME Bank. Crown did not hold an account with SME Bank. Nor did it provide any service to SME Bank.

[102] The court below rightly referred to this body of evidence as 'this overwhelming body of convincing and sufficient evidence' (in support of the claim under s 430) to which Mr Kamushinda responded in his answering affidavit:

' . . . if ever money was paid into the accounts of entities in which I may have shares, I respectfully submit that such entities are legal personas in their own right and until and unless the corporate veil has been pierced cannot be held liable.'

And he stated further:

'I insist that the applicants in reconvention have a duty to pierce the corporate veil, a duty they have thus far dismally failed at.'

He also denied the allegations by way of a bare denial but added:

" . . . all transfers" to my account were legitimate and the insinuations made are simply wrong".

[103] The court rightly found that the claim against Mr Kamushinda under s 430 of the Act was established.

[104] Mr Kamushinda's appeal against the order granted against him under s 430 of the Act likewise enjoys no prospects of success.

Concluding remarks

[105] A total of at least N\$247 535 004 was looted from SME Bank in the manner set out above. This occurred over a period spanning several years until BoN took over control of SME Bank on 1 March 2017 and eventually applied to place it under provisional liquidation on 11 July 2017, made final on 29 November 2017. Quite how this systematic looting of a registered bank was able to proceed over such a sustained period raises questions concerning the efficacy of the regulation and supervision of SME Bank by BoN, especially after SME Bank's external auditors raised concerns about investments totalling N\$196 million with a South African concern and drew these concerns to the attention of BoN more than six months before the latter took over control of SME Bank on 1 March 2017.

[106] The numerous payments to which Mr Kamushinda was party which are well documented in the counter-application would *prima facie* appear to constitute not only contravention(s) of s 430(4) but also more serious crimes including theft and contraventions of the Prevention of Organised Crime Act 29 of 2004 (POCA). Yet we were informed at the hearing that no warrant for the arrest of Mr Kamushinda has been issued. The *prima facie* criminal conduct on the rampant scale set out in the counter-application is of massive proportions, involving the theft of more than N\$247 million from a registered bank to the detriment of its several deposit holders and creditors. Economic crime of this scale within the context of the Namibian economy justifies an appropriately serious response. The registrar is directed to provide a set of papers in the counter-application to the Prosecutor-General.

[107] Finally, the liquidators are to be commended for the thorough investigation they pursued which has uncovered the nature and extent of the looting of SME Bank. These investigations have involved meticulously gathering evidence to determine and pinpoint liability for those losses and their extent. Not only has the body of creditors been very well served by this exercise, but the public interest has also been served in the process of bringing to light the systematic looting of a registered bank to the detriment of its depositors and creditors and the financial system as a whole.

Orders

[108] The condonation and reinstatement application filed on 21 January 2022 and set down for hearing on 29 March 2023 and the reinstatement application brought on 29 May 2023 both fail comprehensively to establish both components of good cause required for condonation and reinstatement. They both lack a satisfactory explanation and it is clear that the appellants' appeal bears no prospects of success. Those applications fall to be dismissed. Insofar as the liquidators also sought an order requiring that the appellants must provide security for the judgment debts before launching any new application for condonation and reinstatement, the necessity for such an order would not seem to arise. That is by virtue of the findings made that the appeal against the various orders of the High Court enjoys no prospects of success. As was held by this Court,¹¹ an appeal without prospects of success is an exercise in futility and therefore frivolous and that its only reason would be to annoy and in that sense would also be vexatious.¹² The court in *Somaeb* also held that this Court has an inherent jurisdiction to prevent an abuse of its process. The liquidators would thus not be without a remedy should the appellants launch any further application for

¹¹ *Permanent Secretary of the Judiciary v Somaeb & another* 2018 (3) 657 (SC).

¹² Para 15.

condonation and reinstatement of the appeal. The orders of the High Court, which have been executable following the lapsing of the appeal in early 2021 by reason of non-compliance with rule 14 on 28 January 2021 or 21 days thereafter, are executable.

[109] The following order is made:

1. The application for condonation and reinstatement filed on 21 January 2022 is dismissed with costs.
2. The application for reinstatement dated 22 May 2023 is dismissed with costs.
3. The appeal having lapsed in early 2021, the orders of the High Court are executable.
4. The costs referred to in paras 1 and 2 include the costs of one instructing and two instructed legal practitioners on the scale between legal practitioner and client and include the costs for preparation and appearances on 27 March 2023 and 1 March 2024, except in respect of preparing the answering affidavit to the condonation application filed on 21 January 2022 such costs are limited to 50 per cent of such costs on the same scale.
5. The registrar is directed to provide a copy of the judgment and the record of these proceedings to the Prosecutor-General.
6. The registrar is directed to provide a copy of this judgment and the papers in the condonation application filed on 21 January 2022 to the Disciplinary Committee for Legal Practitioners.

SMUTS JA

MAINGA JA

FRANK AJA
APPEARANCES

APPELLANTS:

No appearance

RESPONDENTS:

R Heathcote (with him J Schickerling)

Instructed by Koep & Partners