THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 20152/2014

Reportable

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

CANDICE-JEAN VAN DER MERWE **RESPONDENT**

Neutral citation: *The Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* (20152/2014) [2015] ZASCA 86 (28 May 2015)

Bench: Ponnan, Wallis and Mbha JJA and Fourie AJA and Mayat AJA

Heard: **6 May 2015**

Delivered: **28 May 2015**

Summary: Appeal lapsing – application for condonation – breaches of the rules of such a nature and explanation offered so unacceptable and wanting that condonation refused irrespective of the applicant's prospects of success on appeal. Tax Administration Act 28 of 2011 – section 163 – appointment of a *curator bonis.*

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Savage AJ sitting as court of first instance)

In the result:

(a) The application for condonation by Ms Candice-Jean van der Merwe is dismissed with costs including those of two counsel on the attorney and client scale.

(b) The appeal by SARS is upheld with costs including those of two counsel.

(c) The order of the court below is set aside and replaced with the following:

'1. Save for the exclusion of the "Standard Bank Marketlink account 374170991 (Milnerton)", paragraph 5(a) of the provisional order granted on 30 August 2013 against Ms Candice-Jean van der Merwe (the second respondent) is confirmed.

2. Mr Cloete Murray of Sechaba Trust (Pty) Ltd is appointed to act as *curator bonis* in whom the right, title and interest in all the assets of the second respondent will vest, including, but not limited to, any shareholding, loan accounts, member's interest, moveable and immovable assets and funds held in bank accounts.

3. Subject to the conditions and exceptions contained in this order, save with the prior written consent of the applicant, which consent may not be unreasonably withheld, no-one except the *curator bonis* may deal with the second respondent's assets.

4. The *curator bonis* is authorised to immediately take control of the second respondent's assets.

5. The *curator bonis* is authorised to take all steps necessary to ensure the transfer of the shareholding and member's interests in the second respondent's name into the name of the *curator bonis*.

6. Where shareholding and/or member's interest vest in the *curator bonis* as a result of this order, the *curator bonis* will have all the powers of a registered shareholder of such shares and/or of a member with such member's interest as vested in him,

including, but not limited to the power to hold shareholder meetings and to remove and appoint directors.

7. Any person having books and records or assets of the second respondent in his/her possession, must, subject to what is provided below, when this order comes to that person's knowledge, notify the *curator bonis* of that fact and hand copies of them to the *curator bonis* on demand, or within such time as the *curator bonis* may allow.

8. Save for personal effects, no person may remove any item from the premises of any property owned or occupied by the second respondent, without the permission of the *curator bonis*, which permission may not be unreasonably withheld.

9. The *curator bonis* is entitled, in order to give effect to this order, to interview the second respondent, who is obliged to furnish the *curator bonis* with full particulars within three days of service of this order on her, of all her assets and how such assets were acquired.

10. The *curator bonis* is entitled, in order to give effect to this order, to interview third parties identified by him and who may have knowledge of the whereabouts of the assets of the second respondent.

11. All the above powers must be exercised by the *curator bonis* strictly in the interests of the second respondent and with the objective of ensuring that the maximum value of the assets be maintained and/or recovered.

12. The powers of the *curator bonis* may be amended or terminated on application by any interested party.

13. All reasonable costs of the *curator bonis* occasioned in the implementation of this order will be paid by the second respondent.

14. The *curator bonis* will be liable for any damages caused by him as a result of acting *ultra vires* or unreasonably in the execution of his duties in terms of this order and the applicant is responsible to ensure that no-one will suffer damage as a result of the *curator bonis* not having put up security or sufficient security for compliance with his duties in terms of this order.

15. The second respondent is ordered to pay the costs of the application, such costs to include those of three counsel.'

JUDGMENT

Ponnan JA (Wallis and Mbha JJA and Fourie and Mayat AJJA concurring):

[1] In this matter the appeal by Ms Candice-Jean van der Merwe lapsed for failure on her part to prosecute it timeously. The initial question before us, in relation to her appeal, is thus whether her default should be condoned and the appeal revived. There is, as well, an appeal by the other party to the litigation, the Commissioner for the South African Revenue Service (SARS). Before turning to a consideration of either the application for condonation by Ms Van der Merwe (the applicant) or SARS' appeal, it may be convenient to first describe how both appeals arose and the one came to lapse.

[2] The principal protagonists in the matter are SARS and the applicant's father, Mr Gary van der Merwe. The latter declared R60 000 taxable income for each of the 2004, 2005 and 2006 years of assessment and R70 000 taxable income for the 2007 year of assessment. He appears not to have declared any taxable income for the subsequent years of assessment and submitted zero returns to SARS for that period. In respect of the 2002 and 2003 years of assessment, SARS raised additional estimated assessments in respect of Mr van der Merwe in terms of the Income Tax Act 58 of 1962 (the ITA), which resulted in a tax debt of R30 222 881.70. As at 31 July 2011, the amount, inclusive of penalties, additional taxes and interest, stood at R66 206 256.53. Mr van der Merwe did not object to the assessments and they have become final and conclusive. On 9 September 2011, SARS obtained a tax judgment against Mr van der Merwe by way of an entry in the judgment book of the registrar of the High Court as contemplated by s 91(1)*(b)* of the ITA.[1] SARS contends that despite Mr van der Merwe

[1] Section 91(1)*(b)* of the ITA has since been repealed and replaced by s 172 of the Tax Administration Act 28 of 2011.

having amassed substantial wealth, he claims not to own any assets, which so the contention goes, is a stratagem designed to obstruct tax collection.

[3] According to SARS, Mr van der Merwe has over a number of years, been associated with certain juristic entities that have fraudulently claimed VAT refunds from SARS. They, so SARS asserts, are collectively liable to it for tax, additional tax, penalties and interest in an amount in excess of R225 million. In the result, on 19 August 2011 SARS applied to the Western Cape Division of the High Court, Cape Town against a total of 22 respondents, including Mr van der Merwe, the applicant (Ms van der Merwe) and a host of corporate entities for a preservation order, as also the appointment of a curator *bonis* in terms of 163(4)*(a)* of the Tax Administration Act 28 of 2011 (the TAA).

[4] In support of the application Ms Elle-Sarah Rossato, a senior SARS official as contemplated in s 163 of the TAA, who deposed to the founding affidavit, stated that:

'The preservation order is sought to secure assets, which may be executed against in respect of existing indebtedness to SARS, but also in respect of indebtedness still to be established. All indications are that such indebtedness will be for a considerable amount, which I believe will be in excess of the values of the assets made subject to this order.'

She added that SARS entertained the 'reasonable belief that Mr van der Merwe uses the respondents, other persons and entities to hide his assets' and asserted that 'the appointment of a curator *bonis* will be required for the collection of the outstanding taxes'.

[5] Despite relatively modest earnings from her modelling career (she declared taxable income of R20 023, R20 912, R24 995 and R45 336 for the 2009 to 2012 tax years) lady luck, it would seem, suddenly smiled on the applicant during 2013. According to SARS, it had been made aware by the Financial Intelligence Centre that the Standard Bank of South Africa had received USD 15,3 million for her benefit on 16 May 2013. The remitter of those funds, which had been transferred from the Bank Med Sal in Lebanon, was identified as Muhamad Muhamad Nazih Rawwas. Moreover, she

acquired two motor vehicles during May and June of that year, namely an Audi R8 Spyder and a Range Rover Evoque collectively valued in excess of R 2, 5 million. SARS asserted that: (a) the applicant was simply a conduit and had received the funds in question on behalf of and for the benefit of her father; and (b) the income declared by her could not sustain the acquisition of those vehicles.

[6] On 20 August 2013, Rogers J issued a provisional preservation order in terms of s 163(4)*(a)* of the TAA. But the learned judge, who dealt with the matter ex parte and in chambers, did not appoint the *curator bonis* sought by SARS. In respect of the applicant, the order read:

'5. A provisional order is made in respect of the second respondent (Candice van der Merwe) as follows:

(a) Candice van der Merwe is interdicted from dealing with, disposing of, encumbering or removing from the Republic any of the following assets:

(i) Audi R8 Spyder (CA481415; engine BUJ008480);

(ii) Land Rover Evoque;

(iii) any monies standing to the credit of any bank accounts in her name or in respect of which she has signing powers to the extent that such monies represent any residue of the sum of US$15,3 million (converted into the rand amount of R142 901 673) received by her on or about 16 May 2013, such accounts to include (without derogating from the generality of the foregoing) any amounts held in any of the following bank accounts: FirstRand Bank account 62403543756 (Rosebank branch, Gauteng) in the name of Lucra Movables (Pty) Ltd; Standard Bank third party administration account 271783230 (Kromboom branch); and Standard Bank Marketlink account 374170991 (Milnerton branch);

(iv) any monies held on trust by Perold & Associates and/or Bill Tolken Hendrickse in the name of or for the benefit of Candice van der Merwe or in the name of any other person or entity on whose behalf Candice van der Merwe is accustomed to give instructions in respect of such monies;

(v) any other assets acquired by Candice van der Merwe from the proceeds of the said amount of R142 901 673.'

The order continued:

‘(b) This provisional preservation order is granted to preserve assets in respect of which there is *prima facie* evidence indicating:

(i) that the assets in question in truth belong to Gary van der Merwe and are thus realisable in respect of his alleged tax debts;

(ii) alternatively, that they will be realisable to satisfy any claim which Gary van der Merwe may have against Candice van der Merwe in respect of funds made available to her at his instance;

(iii) alternatively, that Candice van der Merwe may, in terms of s 182 or s 183 of the Act, be held jointly and severally liable for the tax debts of Gary van der Merwe by virtue of her participation in the receipt and further handling of the sum of R142 901 673 previously mentioned.’

But paragraph 5(b) is, in truth, an explanatory note and ought not to have formed part of the order.

[7] After the grant of the order by Rogers J, the applicant alone chose to anticipate the return day, with the result that SARS’ application in relation to her proceeded separately from the other respondents. In her answering affidavit, she explained her acquisition of the two vehicles and this large sum of money as follows:

‘12. When I was 15 I had met Ryan Hignett (“Hignett”). He books models to travel to the Seychelles (and possibly other destinations) to be in attendance at such resorts. I was too young at that time to travel and work abroad on my own. When I was 19 years old he contacted me and asked me if I was interested in travelling to the Seychelles for this work. I replied in the affirmative. He then contacted Ice Models on my behalf for this purpose.

13. In 2012 I was contracted th[r]ough Ice Models to travel to the Seychelles to the Plantation Club on Mahé Island.

14. The Plantation Club is a private resort in the Seychelles which is owned and frequented by some of the richest private individuals in the world. They include multi US dollar billionaires for whom money is no object. This type of resort is the playground of the super wealthy where they can relax in total privacy away from the intrusions that normally accompany their lifestyles such as paparazzi and constant security threats due to their extreme wealth and status. Privacy and more importantly security is paramount to these persons. For this reason only people who have been vetted and security checked are allowed at the resort. It often poses a security risk should it be public knowledge that a specific high profile individual is at a specific location. It is

the norm for lavish parties and events to be held at the resort. Such parties and events will often feature celebrity entertainers or disc jockeys with international acclaim. Models from only the trusted agencies are routinely flown in from all over the world to lend a sense of glamour and exclusivity to these events and by definition the resort.

15. Models such as myself who are employed at the Plantation Club are prohibited from taking photographs or disclosing the identity of any persons who they meet at the resort. When we arrive we are picked up in a bus. Our passports are taken from us and only returned when we leave. If you are found taking a photograph, your contract is terminated and you are sent home.

16. On my first trip to the Seychelles from 13 October to 17 October 2012 I got on very well with the persons I met at the private resort. While I cannot be certain as to the reasons for this, I suspect that it included the following factors: I have a very healthy lifestyle and I do not smoke at all or drink alcohol other than in negligible quantities on social occasions and I follow a strict exercise regime. I have also been told that I have a very engaging personality.

17. This resulted in me being booked through Ice Models (Ice Genetics section) to travel to the Seychelles on subsequent occasions.

18. The trips so far for the above mentioned purpose have been over the following dates:

. . .

19. The initial request for me to travel to the Seychelles came through Ice Models.

20. I travelled economy class on the first two trips. Thereafter I was elevated to travelling business class and then first class (when available). All travel arrangements were made by Ice Models and they e-mailed the airline tickets to me, sometimes on notice of a few hours.

21. As previously mentioned, I am specifically not in any circumstances entitled to name any of the persons who I meet at the resort or what events take place (famous entertainers are sometimes flown in).

22. During my trip to the Seychelles from 9 to 23 March 2013, one of the topics of conversation which came up was cars that I liked. I made no secret of the fact that my dream car is an Audi R8. I even had a picture of one on my cell phone.

23. When I returned to Cape Town after the March 2013 trip I was involved in a car accident in which the car I was driving was written off. I was also injured (sprained ankle and abrasions). My cell phone was damaged (the screen was cracked) and I did not have a car to drive. Arising out of this I was very traumatised and discussed the incident with numerous people including persons with whom I have become friendly while I have been in the Seychelles.

24. A few days later I was thrilled to receive a phone call from a salesman by the name of Jacques Taljard at the V&A Waterfront Audi dealer who told me to come to the dealer to fetch my car. I went to the Audi dealer with my mother, Monique van der Merwe and was presented with an Audi R8 Spyder which Mr Taljard told me had been paid for in cash and it was already registered in my name. . . .

25. Just before I received the car, I also received two brand new cell phones via courier (iPhone 5 and Z10 Blackberry, one cell phone with international roaming) which had already been paid for and which I currently use on an unlimited basis, including international use anywhere in the world – and I have not had to pay one cent at all for the use thereof.

26. Notwithstanding the fact that I now had an Audi R8, in June 2013 I was given a Land Rover Evoque. Again, I did not pay anything at all for this vehicle. . . .

27. Earlier this year a number of my friends whom I had met in the Seychelles came on a trip to Cape Town. In the course of my chatting with them we spoke about different areas in Cape Town and I said that when I start looking for a house it will be in the Camps Bay, Clifton, Fresnaye area.

28. It was suggested to me that I look for a house in one of those areas which I liked because I would receive funds to pay for it. Price was not mentioned. I looked at about 30 houses in areas such as Camps Bay, Bantry Bay, Clifton and Fresnaye. I then saw 50 Ave St Bartholomew in Fresnaye with Jackie Rosenberg of Pam Golding Properties. I loved the property. The asking price was R110 million which I communicated to my friends with whom I had discussed buying a property in Cape Town.

29. Subsequent thereto, and as stated by the Applicant, the amount of US$15.3 million ("the funds") was remitted to me by Mr Mohamed Rawas ("Rawas"). It is this amount which forms the subject matter of and catalyst for the bringing of this application.

30. As I have no commercial or business experience I requested my father, who is an experienced businessman, to assist and represent me in dealing with the funds and the negotiations for the purchase of the property and the acquisition thereof.

31. Arising out of the negotiations by my father on my behalf I bought the property and it has been transferred to me.'

[8] The matter eventually came before Savage AJ, who, on 28 February 2014 confirmed the whole of the provisional order granted by Rogers J with costs including the costs of three counsel. As paragraph 5(b) ought not have been included in the provisional order, it should not have been confirmed by the learned judge. For reasons

that are entirely unclear, Savage AJ did not enter into the question of the appointment of the curator sought by SARS. As a result, SARS initially attempted in terms of Uniform rule 42 (alternatively the common law) to have the order of Savage AJ corrected, on the basis, so it was suggested, that the learned judge had erred in the formulation of her order. Its attempt to have the order rectified came to nought because as SARS' attorney explained in a letter on 27 March 2014:

'SARS' advice is that the court in so acting rendered itself *functus*; the omission was (as now explained by the court) not inadvertent, - as SARS had pleaded and argued from the outset – but simultaneously intended by the court and (with respect) misconceived.'

The letter continued:

'4. The parties have endeavoured in these circumstances to resolve the complex situation which has arisen, and to avoid further papers, hearings, rulings, and costs.

5. It has been agreed as between SARS and Ms van der Merwe accordingly that:

5.1 SARS will withdraw its application to correct the orders of 28 February (and pay Ms van der Merwe's costs in relation to that application)

5.2 An order will be sought by consent granting leave to appeal to Ms van der Merwe as sought, and leave to SARS to cross-appeal in relation to the exclusion from the court order of the ancillary preservation orders comprising annexure "B" to the notice of motion.

6. We attach in this regard:

6.1 The draft order to be sought by consent;

6.2 A formal notice of cross-appeal to comply with the requirements of Rule 49(1)(*b*);

6.3 SARS' notice of withdrawal of the correction application, in terms of Rule 41(1).'

[9] On 28 March 2014, the draft order was made an order of court, in terms of which leave was granted to: (a) the applicant to appeal to this court against the grant by the High Court of the preservation order; and (b) SARS to cross-appeal against the failure of the High Court to appoint the curator sought by it. However, the applicant failed to take any steps whatsoever to prosecute her appeal with the result that it lapsed.[2] On 21 May 2014 and on the basis that it was now *dominus litis* in the appeal, SARS served and filed its notice of appeal. On 9 June 2014 and in terms of rule 9(a) of this court's

[2] The applicant was required in terms of rule 7(1)(b) of the SCA rules to file a notice of appeal with both the registrar of this court and the court *a quo* within one month of the grant of leave to appeal by Savage AJ. And, in terms of rule 8(1), to lodge six copies of the record of the proceedings in the court *a quo* within three months of the filing of her notice of appeal.

rules, SARS' attorney requested the applicant's then attorney, Cornel Stander, to consent to documents that were considered to be irrelevant, being excluded from the appeal record. That letter went unanswered. On 17 July 2014, SARS' attorney repeated that request to Deon Perold and Associates, who had since placed themselves on record as the applicant's new attorney. On 25 July 2014, SARS' attorney recorded, with reference to a telephonic discussion held with Mr Perold three days earlier, that the applicant did not agree to SARS' proposal 'to omit unnecessary material from the appeal record'. The letter continued 'your instructions, as we understand them, are that the entire contents of the court file . . . – exceeding 3 000 pages – are to form part of the record . . . despite the limited nature of the appeal. Kindly now provide us with your client's formal response in compliance with SCA Rules 8(9)(b) and 8(9)(c) . . . to omit unnecessary parts of the papers from the appeal record'. The next day Mr Perold responded 'we confirm that we have once again obtained our client's further instructions herein. Our client is in agreement that the majority of the record can be omitted as per you[r] suggested index provided'.

[10] On the basis of the agreement eventually reached, the record was finalised by SARS and filed with the registrar of this court on 26 August 2014. It was only thereafter on 29 August 2014 that Mr Perold formally enquired whether SARS would be willing to 'agree to the late filing of our client's Notice of Appeal'. By this stage some four months had expired since the applicant's appeal had lapsed. On 2 September 2014, Mr Perold was informed that SARS would not accede to the applicant's request. In any event in terms of rule 7(4) of this court's rules, which provides: '[t]he time limit for lodging of the notice of appeal may be extended by written agreement of all the parties to the appeal for a period not exceeding a further month', SARS was precluded from consenting to the late filing of the applicant's notice of appeal inasmuch as the further month envisaged in the rule had long since elapsed. Almost the entire month of September was to pass before an application for condonation was served on SARS' attorney by email on 30 September 2014. That application, however, was not properly served or filed thereafter. These and other defects were alluded to in SARS' heads of argument filed on 7 October 2014. In the meanwhile on 3 October 2014 and notwithstanding the

earlier consensus in respect of the appeal record, the applicant's attorney purported, unilaterally and without the leave of this court, to file a supplementary record consisting of a further 126 pages. Eventually, on 10 October 2014 a formal condonation application was served and filed. Also on that date heads of argument were filed in anticipation of the applicant's 'application for condonation of the late delivery of [her] notice of cross-appeal being granted'.

[11] Condonation, as pointed out in *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; 2004 (1) SA 292 (SCA) para 6, 'is not to be had merely for the asking'. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (*Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11).

[12] In *Uitenhage Transitional Local Council* it was stated (para 6):

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever she realises that she has not complied with a rule of this court, apply for condonation without delay (*Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H).

[13] The application for condonation was brought by Mr van der Merwe on behalf of the applicant. It was he who deposed to the founding and replying affidavits in the application. He stated in the founding affidavit:

'22. As a result of the granting of the Rogers Order, i.e. that by agreement between the parties, the matter was settled on the basis that a *curator bonis* would be appointed only in respect of the 14th Respondent, I believed that no further steps would be taken by SARS in the prosecution of the Cross Appeal in respect of the Savage Judgment. In essence I believed that the appeal was no longer of relevance because the issues in regard to the funds dealt with therein and in the main application would be dealt with in the High Court action. I sought a legal opinion on this from my attorney at the time, Cornel Stander, whose advice to the Respondent/Cross-Appellant was not to proceed with the prosecution of the Appeal. For this reason Respondent/Cross-Appellant's Notice of Appeal was not filed within the prescribed time limits.

23. At the time of the granting of the leave to Appeal, Deon Perold of Deon Perold and Associates Incorporated ("Perold") and Cornel Stander from Cornel Stander Attorneys ("Stander") were the attorneys of record for our various legal matters. As stated above, Stander was the attorney of record for the Respondent/Cross-Appellant in this matter ("the Appeal").

24. Due to the financial constraints placed on us we have had to terminate the services of Stander and consequently Perold has had to take over all the matters with the concomitant administrative and time constraints that are associated with taking matters in midstream. Not only was Perold burdened with taking over all the matters that Stander was dealing with but he was also detained with the unbundling of a failed merger with another firm at short notice and had to relocate his practice on the 2 June 2014. This and the associated challenges such as the moving of telephone lines, internet and infrastructure had an adverse effect on the administration of the matters.

25. As a result of the legal advice that I had received from Stander in respect of the Appeal, namely that the Respondent/Cross-Appellant would not continue with the prosecution thereof, I did not inform Perold of the pending Appeal or our decision not to proceed therewith as I did not think it was relevant at that time.

26. SARS filed their notice of Appeal on Stander on the 23 May 2014. Perold only started acting for the Respondent/Cross-Appellant in this matter in and during the middle of June 2014.

27. As a result the question of the Appeal being prosecuted by SARS only became an issue during the preparation of the Release of Funds application (under this case number), which was initiated by the Respondent/Cross-Appellant towards the end of June 2014.

28. When Perold became aware of the Appeal issue he suggested that the Respondent/Cross-Appellant obtain a second opinion on whether or not to proceed with the Cross Appeal as he was of the view that the Respondent/Cross-Appellant should proceed therewith.

29. Towards the end of June an opinion was obtained from Counsel and it was decided that the Respondent/Cross-Appellant would proceed with the prosecution of the Cross Appeal. It was only then that Perold commenced attending to the Cross Appeal and filed the Respondent/Cross-Appellant's Notice of Appeal on the 3 of July 2014.

30. The Respondent/Cross-Appellant's however erroneously filed a Notice of Appeal, which should in fact have been a Notice of Cross Appeal as SARS had already filed their Notice of Appeal. Furthermore, the said Notice of Appeal was served on the Appellant/Cross-Respondent and only filed at the High Court and not at the above Honourable Court. . . . That notice also did not set out the terms in respect of which the Order appealed against was sought to be varied and did not attach a certified copy of the Order in terms of which leave to appeal was granted. Annexed hereto and marked "**V5a**" is a fresh notice correcting the aforegoing aspects which will be served and filed.

. . .

38. As soon as was reasonably possible after reaching a decision to proceed with the Appeal, the Cross-Appellant, whose legal representatives believed at that time was the Appellant, filed her Notice of Appeal as referred to above. It is respectfully submitted that this was a clear manifestation by the Respondent/Cross-Appellant of her intention to proceed with the prosecution of the Cross Appeal.

39. As stated above and due to the urgency of the other litigation the Respondent/Cross-Appellant was only now in a position to prepare the application for condonation. This was done on the basis of her being the Appellant. Her Bloemfontein correspondent attorneys suggested that she should be referred to as Respondent/Cross-Appellant and confirmed this with the Registrar of this Court. This affidavit and her heads of argument and practice note therefore had to be amended to correctly reflect her as the Respondent/Cross-Appellant.

40. It is respectfully submitted that Respondent/Cross-Appellant's non-compliance with the Rules of this Honourable Court has not prejudiced SARS – indeed, it is proceeding with its Cross Appeal in the very same matter.'

[14] That affidavit was deposed to on 8 October 2014. Despite the benefit of SARS' heads of argument, it still mirrored the earlier defective condonation application without

purging the identified defects. The founding affidavit does not explain why the application, which was evidently ready on 30 September 2014, was not formally served and filed then or why it was held in abeyance until after SARS' heads of argument had been filed. The application was launched approximately: (a) five months after the applicant's notice of appeal should have been filed; (b) three months after the applicant's notice of appeal was belatedly filed in the High Court; (c) three months after Mr van der Merwe, had stated in an affidavit filed on 2 July 2014 in support of an urgent application for the release of certain funds that were subject to the preservation order that the applicant's 'Notice of Appeal was served out of time and the necessary condonation application will be sought'; and (d) three and a half weeks after SARS had intimated that it would not consent to the late filing of the applicant's notice of appeal.

[15] On Mr van der Merwe's own version by 23 May 2014, when SARS filed its notice of appeal, they knew that SARS was proceeding with the appeal. And by the end of June of that year, a firm decision had allegedly been taken to prosecute the applicant's appeal. And yet a further three months was to expire before the application for condonation was lodged with the registrar of this court. Despite professing to be fully aware of the facts and circumstances leading up to the application, Mr van der Merwe forbears revealing the date when: (a) his erstwhile attorney, Mr Stander, advised that it was not necessary to prosecute the appeal; (b) Mr Stander's mandate was terminated; (c) in June Mr Perold began to act for him; (d) in June when Mr Perold advised him not to prosecute the appeal; (e) counsel was instructed to provide a second opinion on whether to proceed with the appeal; and (f) in June the second opinion from counsel, advising that the appeal should be prosecuted, was received. This demonstrates an obvious lack of attention to matters that plainly called for an explanation and evidences a failure to fully and candidly enlighten the court, as an applicant in a matter such as this was obliged to do (*Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* above). It follows that the explanation proffered is woefully inadequate and I thus find it impossible to hold that the delay in bringing this application has been explained in a manner which is even remotely satisfactory.

[16] Moreover, the explanation, such as it, fails at virtually every level. First, Mr van der Merwe attempts to excuse the delay by invoking advice from his attorney, Mr Cornel Stander. It is well-established that a litigant is not permitted to invoke advice which is demonstrably unreasonable. As it was put in *S v Longdistance (Natal) (Pty) Ltd* [1989] ZASCA 129; 1990 (2) SA 277 (A) at 283I-J, 'legal advice has no magic which justifies the recipient in jettisoning common sense'. Particularly where such advice, as here, is at odds with previous advice.[3] Second, Mr van der Merwe suggests that he 'believed' (significantly, it is his belief relied upon and not that of his daughter - the litigant in the matter) that because of the appointment of a *curator bonis* in respect of the fourteenth respondent, SARS would not take any further steps in the prosecution of its cross-appeal. But, there is no scope for this mistaken belief, because SARS did timeously and diligently prosecute its appeal. And, acting consistently with its clear intention to do so, SARS' attorney called upon the applicant's attorney to comply with this court's rules. All of that postdated the order on which Mr van der Merwe pins his 'belief'. Third, Mr van der Merwe seeks to make the point that they have been very busy with other litigation in the High Court. This is no excuse at all. Rule 7(3) of this court's rules simply requires that a notice of appeal be filed which: (a) states which part of the judgment or order is appealed against; (b) states the particular respect in which the variation of the judgment or order is sought; and (c) is accompanied by a certified copy of the order granting leave to appeal. Nowhere does Mr van der Merwe provide an explanation for failing (on a very generous approach to him) since 3 July 2014 to file a simple notice of appeal. The notice of appeal that was eventually filed, reads:

'Be pleased to take notice that Cross-Appellant intends to cross appeal against the order and judgment granted by Her Ladyship Acting Justice Savage handed down on 28 February 2014 in the Western Cape Division of the High Court, Cape Town.'

Take notice further that the cross appeal is against the whole of the order as referred to above.

Take notice further that a certified copy of the court order granting leave to appeal and cross appeal to this court is attached marked 'A'.

[3] Applying this court's judgment in *Longdistance*, it was held in *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) at 1136G-H that "[w]here persistent litigation is involved, a litigant is obliged to weigh the advice given to him and, in particular, to pay attention to his rate of failure and compare it to the advice on which he has hitherto relied".

This, one imagines, could hardly have taken more than an hour to prepare. What is more, a host of documents, most of which had already formed part of the appeal record already filed by SARS, were rather indiscriminately and unnecessarily annexed to Mr van der Merwe's affidavit. Those included: the judgment of Savage AJ; the order of Rogers AJ dated 19 March 2014; the respondent's application for leave to appeal filed with the High Court on 7 March 2014; the notice of application for leave to cross appeal filed by SARS with the High Court on 27 March 2014; the order of Savage AJ granting leave to appeal (to the respondent) and (cross appeal to SARS) on 28 February 2014; and the respondent's notice of appeal filed with the High Court on 3 July 2014.

[17] Mr van der Merwe's affidavit also did not identify any of the grounds sought to be advanced. It simply attached the application for leave to appeal in the High Court. Nor did it address the prospects of success. As was stated in *Rennie v Kamby Farms (Pty) Ltd* [1988] ZASCA 171; 1989 (2) SA 124 (A) at 131E it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. This was not done in the present case: indeed, the application does not contain even a bare averment that the plaintiff enjoys any prospect of success on appeal (*Moraliswani v Mamili* [1989] ZASCA 54; 1989 (4) SA 1 (A) at 10E). The only reference to prospects of success is contained in para 20 of Mr van der Merwe's affidavit, which simply states that Savage AJ was satisfied that 'Appellant' had reasonable prospects of success.

[18] SARS complains that it was precluded from advancing full legal argument in its heads of argument, because the condonation was brought at a time which compelled it to file its heads of argument before the papers in the condonation application had closed. The condonation application was ultimately filed a mere five days before SARS' heads of argument were due. Rule 12(2) of this court allows SARS a month to respond to an application for condonation. The unreasonable lateness by the applicant in bringing the condonation application a mere five days before SARS' heads of argument were due, rendered that time period all but illusory. It would constitute a departure from

procedural fairness and the ordinary practice of a court of appeal such as this to countenance a would-be appellant withholding its condonation application until as late as occurred here. Not only is the conduct of the applicant prejudicial to a party in the position of SARS - the applicant first failed to lodge a notice of appeal in the High Court in time and then repeated that remissness before this court[4] - but to tolerate the type of conduct encountered here would be prejudicial to the administration of justice, the integrity of any appeal process and to the functioning of our highest courts of appeal.

[19] In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789C) that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. I have not dealt with the applicant's prospects of success on appeal because, in my view, the circumstances of the present case are such that we should refuse the application for condonation irrespective of the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal.[5] This applies even where the blame lies solely with the attorney.[6] Here the breaches of the rules are of such a nature and the explanation offered so unacceptable and wanting that condonation ought not, in my view, to be granted, irrespective of the applicant's prospects of success, which were in any event poor. It remains to add that the conduct encountered here is deserving of an order of costs on the punitive scale. The conduct of

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[4] See eg *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] ZASCA 17; [2014] 2 All SA 513 (SCA) at para 10, where reference was made to the compounding effect of a previous failure to comply with the Rules of Court by an applicant for condonation.

[5] See inter alia *Blumenthal v Thomson NO* [1993] ZASCA 190; 1994 (2) SA 118 (A) at 121I; *Ferreira v Ntshingila* [1989] ZASCA 149; 1990 (4) SA 271 (A) at 281J-282A; *Moraliswani v Mamili* supra at 10F; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131H-132A; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A.

[6] *Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase* [1992] ZASCA 185; 1992 (4) SA 852 (A) at 859E-F.

the applicant and her father throughout has generated costs that should not have been incurred. Those costs should plainly not be borne by compliant taxpayers. It follows that the award of costs on the scale as between attorney and client is justified in this case.

[20] Turning to SARS' appeal: It is confined to a consideration of whether the order of the High Court should, as well, have made provision for the appointment of a *curator bonis*. In terms of s 163(7)*(b)* of the TAA a court granting a preservation order, may make any ancillary orders regarding how the assets must be dealt with including appointing a *curator bonis* in whom the assets must vest. In the somewhat analogous context of financial service regulation, Wallis JA stated in *Executive Officer, Financial Services Board v Dynamic Wealth Ltd* [2011] ZASCA 193; 2012 (1) SA 453 (SCA) in para 6:

'Provided the court is satisfied that the registrar's concerns are legitimate and that the appointment of a curator will assist in resolving those concerns it will ordinarily be appropriate to grant an order.'[7]

This approach is consistent with the Constitutional Court's judgment in *Fraser v Absa Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC) para 12, which held in the comparable scenario of restraint orders under the Prevention of Organised Crime Act 121 of 1998 (POCA) that '[t]he effect of a restraint order is to place the defendant's property beyond his or her control and into the hands of a *curator bonis* pending the outcome of the criminal proceedings.'

The Constitutional Court made that observation in the context of s 26 of POCA. Section 26(1) of POCA provides that the National Director of Public Prosecutions 'may by way of an *ex parte* application apply to any competent High Court for an order prohibiting any person . . . from dealing in any manner with any property to which the order relates'. Section 28(1)*(a)*, the operative triggering provision for the exercise of that power, reads: '[w]here a High Court has made a restraint order, that court may at any time appoint a *curator bonis* . . .' This statutory formulation is for all material purposes identical to s 163(7)*(b)*.

[7] Wallis JA was there dealing with s 5(1) of the Financial Institutions (Protection of Funds) Act 28 of 2001, which provides: 'The registrar may, on good cause shown, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.'

[21] SARS sought the appointment of a *curator* and stipulated his powers in its application. Its founding affidavit made plain that the purpose of the application was to apply 'for an order in terms of s 163 of the [TAA], for the preservation of the [applicant's] assets and the appointment of a *curator bonis* to take control thereof in order to secure the collection of tax.' The founding affidavit went on to identify the purpose for which SARS sought the appointment of a curator as being to investigate 'the whereabouts of Mr van der Merwe's assets and the assets of the other respondents'.

[22] According to the applicant, of the approximately R142 million received:

'41. R98 578 030,82 was paid to purchase the three immovable properties (purchase of two directly and one by purchase of the shareholding in Promotrade), as dealt with above.

42. R25 000 000,00 was loaned to Lucra Movable (Pty) Ltd ("Lucra"), now known as Bank on Assets Holdings (Pty) Ltd. . . .

42.5. Furthermore:

42.5.1. I knew that Zonnekus Mansion (Pty) Ltd ("Zonnekus") had been placed under an order of provisional liquidation at the instance of Nedbank Limited.

42.5.2. The shareholding in Zonnekus is held by the Eagles Trust, a family trust of which my sister, my brother (Richard van der Merwe) and I are the sole beneficiaries.

42.5.3. I was advised that this provisional order was about to be made final which would have meant the loss of the company and its assets to the detriment of myself, my brother and my sister. I have a very good relationship with my brother and sister and was very happy to be able to assist them in addition to myself.

42.5.4. It was an added bonus of the agreement with Lucra that it would purchase the Zonnekus Mansion (one of the five properties owned by Zonnekus) from Zonnekus for R10 million as R6 187 260,00 million of these funds could then be used to pay Nedbank which would (and did) result in the discharge of Zonnekus from provisional liquidation.

42.5.5. Lucra paid Nedbank R6 187 260,00 million for this purpose (which included the bond cancellation costs). . . . I understand that a further R2 million was paid to Zonnekus and the balance still remains to be paid.

43. In regard to the balance:

43.1. R7 900 000,00 and R5 000 000,00 was paid to Zonnekus on 27 May 2013 and 19 August 2013 respectively, making a total of R12.9 million, which was credited to loan account in my favour.

43.2. The balance in the approximate amount of R5 million remained in my account.

43.3. The funds in the above two sub-paragraphs were to be used for the purposes set out below.

43.4. The further funding required in relation to the properties was anticipated to be in the region of R11.5 million to R12.5 million. The aforesaid loan account is debited as and when expenditure on the properties is incurred.

43.5. In addition, Zonnekus required funds to settle certain creditors and for working capital and I was and am happy to assist by allowing Zonnekus to use the funds held by it advanced by me on loan account as and when required. It went without saying that I would retain some of the funds and have access to the loan account for my own personal purposes as and when necessary.

. . .

45. All expenses in regard to the properties were to be (and were) paid through Zonnekus. Zonnekus has effected and is in the process of effecting improvements to the aforesaid properties purchased, payment of transfer costs and other expenses in respect thereof (including R260 445.14 and R508 669.14 for transfer duty and costs in respect of erven 1990 and 1991, as appears from the relevant annexures hereto). I provided the funds for these purposes (being the R12.9 million referred to above).

46. In regard to the improvements to the properties to be effected by and paid for by Zonnekus:

46.1. There is a lot of water damage at the properties which requires to be rectified.

46.2. There is a gym which still has to be completed (it is approximately 150 m^2).

46.3. R2.3 million has been spent for gym equipment (R1.15 million has been paid already). . .

46.4. One of the houses on the properties is in a derelict state and it is being rebuilt. Three bedrooms are being added on and parking is being added on for 8 cars.

46.5. Work in respect of the aforegoing has been ongoing since the beginning of July 2013. Contractors, suppliers and labourers have been and have to be paid.

47. I also refer to annexure “CV24” hereto which is a schedule which my father has prepared setting out details of most of the payments made to date from the R12.9 million, with the actual dates of payment as well as those expected and estimated to be made with the expected dates of payment. . . .

47.7. The fact of the Order has the effect that the building work is about to ground to a halt because contractors, suppliers and labourers cannot be paid. It is urgent that these expenses and the ongoing expenses in respect of the improvement to the property are paid.

48. The remainder of the funds, R4,450 million, is in my account number 374170991 at Standard Bank. I have ongoing expenses which have to be paid from this account in addition to what is set out above. For example, rates, taxes, water and electricity have to be paid. The 4 domestic servants, 4 gardeners and groundsmen and 3 security guards have to be paid.'

[23] On 10 June 2013, and shortly after the receipt of the moneys, the Moondance Trust (the Trust) was established. The applicant is the founder of the Trust and in terms of the trust deed she and her father are two of the three trustees. On 19 June 2013, two written agreements were concluded between the Ocean View Trust (as seller) and K2013087647 (South Africa) (Pty) (Ltd) (K20130876470) for the purchase of Erven 1990 and 1991 Fresnaye for the total sum of R 11 million. Mr Van der Merwe represented both K2013087647 and the Trust, the latter having bound itself as a surety and co-principal in terms of each of those agreements. Also on that date the Trust concluded a written agreement with the Hyde Park Trust in terms of which it acquired the entire issued share capital and the credit loan account of Promotrade Projects Fifteen (Pty) Ltd (Promotrade) for the sum of R 86,5 million. Clause 3.4 of the agreement recorded that

'the consideration . . . has been calculated by taking into account the following values agreed to in respect of the assets of the Company:

3.4.1 Movables as set out in Annexure A hereto – R10,500.000.00 (Ten Million Five Hundred Thousand Rand);

3.4.2 Property – Erf 1917 Fresnaye – R76,000,000.00 (Seventy Six Million Rand)'

Once again Mr Van der Merwe represented the Trust. The applicant was appointed a director of Promotrade with effect from 19 June 2013 and the next day she was appointed a director of K2013087647. SARS contends that the various transactions and Mr van der Merwe's clear involvement in them, form part of a *modus operandi* intended to hide assets realisable for purposes of satisfying his extensive tax debt to SARS and that the full facts regarding these transactions remain to be investigated.

[24] The applicant was evidently 'happy' to allow 'Zonnekus to use the funds held by it advanced by me on loan account as and when required.' She further reveals that she engaged Zonnekus to effect what she styles 'improvements' in the amount of R12.9

million to the property acquired with the funds and that it was 'convenient' to operate through Zonnekus' bank account. Mr Van der Merwe's mother is the sole director of Zonnekus, but he describes himself as the 'general manager' of Zonnekus and states that he 'run[s] [its] affairs'. On the applicant's own version, significant sums passed through the Zonnekus bank account for which Mr van der Merwe held exclusive signing powers and over which he had free access. Further on the applicant's deposed version the R110 million property is urgently in need of maintenance. As it was put, albeit once again in the context of POCA, by Streicher JA in *Mngomezulu v National Director of Public Prosecutions* [2007] ZASCA 11; [2007] 4 All SA 979 (SCA) para 20:

'In terms of the restraint order sought the appellants were prohibited from dealing with the restrained property which constituted almost the entire estate of the appellants. The nature of the restrained property is such that it requires administration. The restraint order therefore necessitated the appointment of a *curator bonis* to administer the property and the conferral on him of the powers referred to.'

The applicant also complains about payments which are required to be made for inter alia gym equipment. She says that if payment is not made, the prejudice to her is 'self-explanatory'. It is 'urgent', so she says, that 'these expenses and the ongoing expenses in respect of the improvement to the property are paid.' The schedule of these payments, according to her, has been prepared by her father. He is thus closely and intimately involved in managing those funds. Indeed there is not a single financial transaction involving funds, ostensibly the property of the applicant, that has not been directed by her father. The apparent situation is that he does whatever he pleases with the funds and she acquiesces in his decisions.

[25] Furthermore, as his approach to this litigation reveals, Mr van der Merwe has a strong presence in the applicant's affairs. He asserts a mandate to conduct the litigation on her behalf, but has chosen not to disclose the full details of the mandate. Similarly, Mr van der Merwe holds a power of attorney from his mother to run Zonnekus Mansions (of which she is the sole director) as he sees fit. Indeed, Mr van der Merwe himself confirmed that his mother's appointment as director of Zonnekus Mansions was a consequence of judgments taken against him. The truth however appears to be that he controls Zonnekus Mansions and that he does so through his mother to escape

judgment creditors. Mr van der Merwe also appears to control the affairs of his daughter. She provided his contact details in the application to sell the foreign currency. She furnished Standard Bank with his cellular number, address and e-mail address. As with Zonnekus Mansions' bank account, Mr van der Merwe also held signing powers in respect of the account into which the R140 million was deposited. Thus at the very least the applicant allows her accounts to be used by her father (or cannot prevent him from doing so). It is evidently Mr van der Merwe's facility to control or influence the transfer of the funds between accounts for which he holds signing powers – which SARS invoked in its founding affidavit in support of appointing a curator. SARS asserted that it may 'under the circumstances [be] undesirable to leave Mr van der Merwe in control of the respondent'.

[26] Mr van der Merwe's evident involvement of family members and his obviously close relationship with the applicant coupled with the extraordinary wealth which she suddenly acquired (allegedly as a gift) requires investigation. It thus seems imperative that a curator investigate how and on what basis those funds were effectively placed at the disposal of Mr van der Merwe and whether and how he has disposed of the funds. It follows that SARS' application for the appointment of a *curator bonis* should have succeeded before Savage AJ and that its appeal in that regard must succeed.

[27] The order sought in the court below included prayers: (a) for the appointment of a retired judge as a mediator (and related relief); and (b) authorising the curator to dispose of the applicant's property in satisfaction of the tax debt. That relief was not persisted with before us. For the rest the order (duly amended to operate only as against the applicant) that issues in respect of the appointment and powers of the *curator bonis* substantially mirrors that sought before the High Court. On 8 November 2013 certain assets subject to the provisional preservation order of Rogers J, including the applicant's Standard Bank account number 374170991, were released from attachment. The proposed order must accordingly reflect this. It, as well, must exclude paragraph 5(b) of the provisional order of Rogers J, which, for the reasons given earlier, ought not to have been confirmed by Savage AJ. Notwithstanding the applicant failing in

her quest to assail the judgment of the court below on appeal, it may conduce to greater clarity to simply set aside the order of that court and replace it with the one set out hereunder.

[28] In the result:

(a) The application for condonation by Ms Candice-Jean van der Merwe is dismissed with costs including those of two counsel on the attorney and client scale.

(b) The appeal by SARS is upheld with costs including those of two counsel.

(c) The order of the court below is set aside and replaced with the following:

'1. Save for the exclusion of the "Standard Bank Marketlink account 374170991 (Milnerton)", paragraph 5(a) of the provisional order granted on 30 August 2013 against Ms Candice-Jean van der Merwe (the second respondent) is confirmed.

2. Mr Cloete Murray of Sechaba Trust (Pty) Ltd is appointed to act as *curator bonis* in whom the right, title and interest in all the assets of the second respondent will vest, including, but not limited to, any shareholding, loan accounts, member's interest, moveable and immovable assets and funds held in bank accounts.

3. Subject to the conditions and exceptions contained in this order, save with the prior written consent of the applicant, which consent may not be unreasonably withheld, no-one except the *curator bonis* may deal with the second respondent's assets.

4. The *curator bonis* is authorised to immediately take control of the second respondent's assets.

5. The *curator bonis* is authorised to take all steps necessary to ensure the transfer of the shareholding and member's interests in the second respondent's name into the name of the *curator bonis*.

6. Where shareholding and/or member's interest vest in the *curator bonis* as a result of this order, the *curator bonis* will have all the powers of a registered shareholder of such shares and/or of a member with such member's interest as vested in him, including, but not limited to the power to hold shareholder meetings and to remove and appoint directors.

7. Any person having books and records or assets of the second respondent in his/her possession, must, subject to what is provided below, when this order comes to

that person's knowledge, notify the *curator bonis* of that fact and hand copies of them to the *curator bonis* on demand, or within such time as the *curator bonis* may allow.

8. Save for personal effects, no person may remove any item from the premises of any property owned or occupied by the second respondent, without the permission of the *curator bonis*, which permission may not be unreasonably withheld.

9. The *curator bonis* is entitled, in order to give effect to this order, to interview the second respondent, who is obliged to furnish the *curator bonis* with full particulars within three days of service of this order on her, of all her assets and how such assets were acquired.

10. The *curator bonis* is entitled, in order to give effect to this order, to interview third parties identified by him and who may have knowledge of the whereabouts of the assets of the second respondent.

11. All the above powers must be exercised by the *curator bonis* strictly in the interests of the second respondent and with the objective of ensuring that the maximum value of the assets be maintained and/or recovered.

12. The powers of the *curator bonis* may be amended or terminated on application by any interested party.

13. All reasonable costs of the *curator bonis* occasioned in the implementation of this order will be paid by the second respondent.

14. The *curator bonis* will be liable for any damages caused by him as a result of acting *ultra vires* or unreasonably in the execution of his duties in terms of this order and the applicant is responsible to ensure that no-one will suffer damage as a result of the *curator bonis* not having put up security or sufficient security for compliance with his duties in terms of this order.

15. The second respondent is ordered to pay the costs of the application, such costs to include those of three counsel.'

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VM Ponnan

Judge of Appeal

APPEARANCES:

For Applicant for condonation:	RWF MacWilliam SC (with him A Kantor) Instructed by: Deon Perold & Associates Inc., Cape Town Webbers Attorneys, Bloemfontein
For Appellant:	JJ Gauntlett SC (with him FB Pelser) Instructed by: MacRobert Incorporated, Cape Town Claude Reid Attorneys, Bloemfontein