THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 139/08

ISMAIL EBRAHIM JEEBHAI	First Appellant
YASMIN NAIDOO	Second Appellant
ZEHIR OMAR	Third Appellant
and	
MINISTER OF HOME AFFAIRS	First Respondent
MICHAEL SIRELA	Second Respondent

Neutral citation:	*Jeebhai v Minister of Home Affairs* (139/08) [2008] ZASCA 160 (27 November 2008)
Coram:	MPATI P, STREICHER, CAMERON, PONNAN and CACHALIA JJA
Heard:	4 NOVEMBER 2008
Delivered:	27 NOVEMBER 2008
Summary:	Matter struck off the roll – no proper record – attorney ordered to pay costs *de bonis propriis*.

ORDER

On appeal from: High Court, Pretoria (Ngoepe JP, Pretorius J and Snijman AJ sitting as court of first instance).

1. The matter is struck off the roll.
2. The third appellant is to pay the wasted costs of the day including the costs relating to the present record, *de bonis propriis*.

JUDGMENT

STREICHER JA (MPATI P and PONNAN JJA concurring)

[1] This is an appeal that was struck off the roll because of the state of the record. The third appellant, Mr Zehir Omar, the attorney of record for the appellants, was ordered to pay the wasted costs of the day including the costs relating to the record, *de bonis propriis*. At the time we indicated that reasons would follow. These are the reasons.

[2] On 12 June 2006 the first appellant launched an application in the Pretoria High Court against the respondents in terms of which he applied for an order declaring, amongst others, that the arrest of Khalid Mahmood Rashid ('Rashid') on 31 October 2005, his subsequent detention and his removal from South Africa were unlawful and inconsistent with the Constitution. The respondents filed an answering affidavit and counter applied for an order that Mr Omar and his professional assistant, the second appellant, be declared to have been in contempt of court and that they be incarcerated for a period of time. The respondents alleged that Poswa J had on 14 May 2006 made an order that certain documents may not be published and that the appellants, in contravention of that order, had published those documents by annexing them to the first appellant's founding affidavit. The notice of motion, founding affidavit and answering affidavit are contained in volume 4 of the record.

[3] An answering affidavit in respect of the counter application, deposed to by Mr Omar and consisting of six pages, is contained in volume 7 of the record (p 557-563). Volume 7 also contains an application for the

clarification of the order by Poswa J on 14 May 2006 (p 618-619) and a copy of the order sought by the first appellant (p 627-628). Although Poswa J apparently granted an order amending the order previously granted by him, I have not been able to find that order in the record. I did find the first three pages of his judgment, which would appear to consist of many more pages, in volume 11 (p 946-948) of the record. Volume 12 of the record contains the judgment of the court a quo (p 960-998), the judgment by the court a quo refusing leave to appeal (p 1010-1021), the order by this court granting leave to appeal and the notice of appeal (p 1204-1039).

[4] These are the documents that are relevant in this appeal. They should have been contained in a maximum of three volumes, yet, the record consists of 12 volumes. Volume 1 contains the documents relating to an earlier application. Volume 2 contains further documents relating to the earlier application and documents relating to a contempt of court application. Volume 3 contains further documents relating to the contempt application, documents relating to an amendment of the notice of motion in the earlier application and an application demanding compliance with another order by Poswa J. The order itself one eventually discovers in volume 11 (p 944-945). Volumes 5 and 6 contain documents relating to an application concerning Rashid, by The Society for the Protection of our Constitution against the Government of South Africa, the Minister of Home Affairs, the Government of the United States of America and the Government of Pakistan. Volume 7 contains some of the relevant documents referred to in para 3 above and in addition an application that was struck off the roll, heads of argument in respect of the application to have Poswa J's order dated 14 May 2006 clarified and the record of proceedings before Poswa J which are of no relevance to the issues to be decided in this appeal. Volume 8 contains the record of proceedings relating, so it would seem, to an application for Poswa J's recusal in the application for the clarification of his order. The rest of

volume 8 as well as part of volume 9 consist of an application for the filing of an additional affidavit, the outcome of which does not appear from the appeal record. Volume 9 also contains affidavits and heads of argument in response to an order that Mr Peter Ramano, a candidate attorney employed by Mr Omar, and Mr Omar should show cause why an order *de bonis propriis* should not be made against them. The rest of volume 9 (p 777-817) consists of the transcript of argument before Poswa J in an application, subsequently withdrawn, by a person to be admitted in the proceedings as an *amicus curiae*. Volume 10 contains a transcript of discussions between Poswa J and the legal representatives relating to the publication of documents annexed to the application to be admitted as an *amicus curiae*. In addition it contains documents relating to an application for leave to appeal against the court a quo's judgment being appealed against, which application was struck off the roll. Apart from the three pages of the judgment by Poswa J relating to the amendment of the order previously granted by him, volume 11 consists of a judgment by Poswa J concerning an earlier application and a judgment by Southwood J in another matter. At the hearing of the appeal counsel for the appellants had to concede that all the documents referred to in this paragraph were irrelevant.

[5] According to the rules of this court an appeal record should not contain documents not proved or admitted (rule 6(j)(v)) and a core bundle of documents should be prepared if to do so is appropriate to the appeal (rule 7). Each party is furthermore, in terms of a practice direction of this court, obliged to file a practice note in which it is indicated which parts of the record should be read. The appellants, in purported compliance with these requirements, filed a practice note in which it is stated that the entire record should be read and that a core bundle is not appropriate due to the concise nature of the record. The practice note is annexed to heads of argument filed and signed by Mr Omar.

[6] As a result of the state of the record and the note by Mr Omar, five judges had to waste hours and hours of their time wading through pages and pages of irrelevant documents in order to determine what was relevant and what was not relevant. The record caused confusion not only in the minds of the judges but also in the minds of the parties and the Wits Law Clinic who applied to be admitted as *amicus curiae*. This confusion appears from the heads of argument filed by the parties and the *amicus curiae*. In its heads of argument the *amicus curiae* states that the facts are common cause. It then recites the alleged common cause facts by reference to documents which should not have formed part of the record and without a single reference to the relevant part of the record. The most important fact for purposes of the argument by the *amicus curiae* is taken from the application by the Society for the Protection of our Constitution. Mr Omar, in his heads of argument, also relies on that fact and on other statements contained in documents that should not have formed part of the appeal record. The respondent, similarly, in the section of its heads of argument dealing with the factual background, states what the appellants' and the respondents' versions are by reference to the earlier applications and not by reference to the application which is the subject of this appeal.

[7] It is evident that Mr Omar never considered what documents should be included in the appeal record except, it would seem, in one respect. In its judgment the court a quo said 'there are not sufficient proven facts from which an inference can be drawn that at the time Rashid was handed over, the authorities were aware that he was being sought (if that was the case) for questioning in connection with alleged acts of terror'. In his heads of argument Mr Omar says that the court a quo 'erred and or misdirected itself in not finding that Annexure "SC14" is evidence of the crime of "enforced

disappearance"'. Annexure SC14 purports to be a statement by the High Commission for the Islamic Republic of Pakistan which reads as follows:

'Mr Khalid Mahmood, a Pakistani national was arrested by South African Authorities on 31 October 2005. Mr Khalid Mahmood was wanted in Pakistan for his suspected links with terrorism and other anti state elements. The suspect was handed over to Government of Pakistan officials on 6 November 2005. Presently he is in the custody of Government of Pakistan.'

However, the document is an annexure to the founding affidavit in the application by the Society for the Protection of our Constitution which should not have formed part of the record. It would seem to have been included in the record to counter the finding by the court a quo referred to above. As an attorney Mr Omar should have realised that the application could not be included as part of the record and that the court a quo could not be criticised for not having had regard to an annexure in that application.

[8] Not having made any attempt whatsoever to satisfy himself that the documents in the appeal record were relevant and that they had been inserted in a coherent order, Mr Omar had the temerity to certify that the entire record had to be read and that a core bundle was not appropriate due to the concise nature of the record! In doing so he treated the rules and practice of this court as well as the court itself with contempt, caused confusion and undermined the proper functioning of the appeal process.

[9] In my view this conduct should not be tolerated. Counsel for the appellants, who were briefed after the heads of argument had been filed, did not even try to defend the state of the record, while the *amicus curiae* agreed that the record was a disgrace. However, both of them urged us to proceed with the hearing of the appeal and to express our disapproval of the record by

way of an adverse costs order and not by way of striking the matter off the roll.

[10] The case concerns the arrest, detention and deportation of Rashid but all of that is history and Rashid has been released by the Pakistani authorities. He is not a party to the proceedings. The proceedings were instituted by the first appellant on behalf of Rashid and the first appellant's brother who had been arrested together with Rashid. We were informed from the bar that Mr Omar has not had contact with Rashid for a year and that the first appellant is no longer interested in the matter as his brother had been released and not deported. In these circumstances the matter is no longer urgent. In fact, when the appeal was set down for hearing on 4 November 2008 Mr Omar complained and asked that it should be set down in February 2009.

[11] In the light of the fact that the matter is no longer one of urgency where the safety and well-being of a person is at stake and in the light of the fact that the culprit in this case, Mr Omar, would seem to be the real driver of the case, I am of the view that striking the matter from the roll and ordering Mr Omar to pay the wasted costs of the day, including all costs relating to the record, is the appropriate remedy. As stated above he has shown a flagrant disregard for the rules of this court. Practitioners who exhibit this kind of attitude should not, and will not be tolerated by this court. To have proceeded with the matter on the basis that he would be deprived of his costs in the event of him being successful would not have been appropriate. First, in the event of the appeal being dismissed it would probably have made little difference to Mr Omar as he would seem to be funding the proceedings. (In one of the affidavits, confirmed by Mr Omar, that should not have been included in the record, it is stated that neither the applicant nor the family of Rashid had paid any fees to Mr Omar Attorneys.) Second, as stated above, it appeared from the heads of argument that the legal representatives prepared

their argument on the basis that all the documents in the appeal record could be relied upon. Third, during the argument as to whether the matter should be struck from the roll, it became apparent that there was uncertainty as to which documents in the record constituted evidence in this matter.

[12] It is true that this court has on occasions despite lamentable records gone ahead and entertained matters, 'balancing the degree of non-compliance against other relevant factors such as prospects of success and the importance of the issues raised.'.[1] But there comes a time when one needs to say 'enough is enough'; and when stern action, such as striking the matter from the roll, must be taken. This is such a case, especially in the light of the fact that, as I have mentioned, there is no longer any urgency in the matter. This is not the end of the road for the appellants. Once a proper record has been prepared they may apply for the reinstatement of the matter and for condonation of the late filing of the record. When that happens, this court may well, in the light of the appellants' prospects of success, the importance of the issues raised and other relevant considerations entertain the matter.

[13] The respondents are not free from blame. Like the appellants, they stated that a core bundle is not appropriate due to the concise nature of the record and that the entire record should be read. However, the primary responsibility is that of the appellants as represented by Mr Omar who should in the circumstances be held personally responsible for the wasted costs of the day and the costs relating to the appeal record.

P E STREICHER
JUDGE OF APPEAL

[1] *Premier, Free State, and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 414 (SCA) para 41.

CAMERON AND CACHALIA JJA dissenting:

[14] When the appeal was struck off the roll on 4 November 2008, we dissented from the order. These are our reasons.

[15] We quite agree that the record is in a lamentable state. We further agree this is due to the deplorable, flagrant and indeed intolerable conduct of the appellants' attorney, Mr Zehir Omar. We agree that this caused unnecessary effort, distraction, vexation and confusion. We agree yet further that some special mark of the Court's displeasure is appropriate. We disagree however that the matter should have been struck off the roll.

[16] This is a case of major public importance and has generated considerable public interest, here and abroad. The appellants allege that under the guise of deportation, Mr Khalid Mahmood Rashid was unlawfully extradited from this country to Pakistan. They claim that because of his alleged links with international terrorists he was, in current parlance, the victim of an unlawful rendition, or an 'enforced disappearance'. If this can be shown to be true on the papers before us, and if the issue is otherwise appropriate for decision, this Court's early pronouncement on the matter is necessary in the public interest. If not, it is equally necessary for this Court to say so.

[17] The appellants' claims received enormous publicity and it is important, either way, for the dispute to be heard and determined as soon as possible. Although the individual concerned has been released, the disputed questions about the propriety of governmental conduct remain very much alive and current.

[18] Our colleagues considered that the egregious conduct of the appellants' attorney necessitated the striking-off order. We strongly disagree. The deficiencies in the record are not such as to outweigh the public importance of determining this dispute. Putting the appeal off to another date, and requiring the attorney to secure its reinstatement, merely wastes time and money, and contributes to wasting scarce judicial resources. That will be even more so if a different panel, or partially different panel, is constituted to hear the appeal if reinstated in due course.

[19] We have all read the record, despite its mangled and over-inclusive state and misleading inclusions. We have noted the relevant and admissible evidence, and sought to disabuse ourselves of the rest. There was in our view no reason why a trained court of five appellate judges could not proceed to sift the chaff and focus on the wheat alone. This is what the appellants' counsel (who had not appeared below) and the amicus asked us to do. Their request was reasonable and deserving. They offered to conduct the hearing on the strictly limited and proper record alone. The respondents themselves came prepared to argue the matter on the record, claiming no prejudice. The evidence in the properly-presented volumes could and should have been dealt with immediately.

[20] It is not as though ill-prepared, incomplete, over-inclusive and shabby records are unknown in this Court. Take *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA). There, Schutz JA – hardly one noted for his indulgent approach to breaches of the rules – said it 'would have required a mathematician deeply versed in chaos theory to work out the system' by which the record was put together (para 42). This is how he described the problems this presented the court (paras 40-41, paragraphing excised):

‘When it was filed the record was in a lamentable state. This has wasted a great deal of judicial time and made what should have been something quite straightforward, a burden. ... To give some examples: Many quite unnecessary documents were included. Thus the petition to the Chief Justice requesting leave to appeal and the whole of the opposed motion proceedings preceding the reference to trial (running to 254 pages) were included. As a result we were presented with 20 volumes of record. Bulk was also added by the duplication or triplication of annexures sometimes in a clump, sometimes widely dispersed. It would have required a mathematician deeply versed in chaos theory to work out the system. For instance, there were two copies of the judgment of the Court a quo. Unfortunately for myself I read the first that I discovered. It happened to be the indistinct copy. Bulk was also added by unnecessary retyping. … Had there been a proper index, that would have alleviated the problems. But there was not. … Records are meant to be read, not fought with.’

[21] This Court heard the appeal in *Firechem*, despite the disgraceful state of the record, and even though there was no suggestion that the appeal involved issues of major public significance. It reflected its displeasure in an appropriately crafted punitive order for costs. That, in our view, is what should have happened here.

_____
E CAMERON
JUDGE OF APPEAL

_____
A CACHALIA
JUDGE OF APPEAL

APPEARANCES:

For appellant:	N Cassim SC F Boda Instructed by: Zehir Omar Attorneys, Springs Goodrick & Franklin, Bloemfontein WLD Law Clinic, C/o Matsepes, Bloemfontein
For respondent:	P M Mtshaulana SC G Bofilatos Instructed by: The State Attorneys, Pretoria The State Attorneys, Bloemfontein
Amicus Curiae:	University of Witwatersrand Law Clinic A Katz M du Plessis