

REPORTABLE

CASE NO: SA 7/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WILLEM MARTHINUS SNYMAN

First Appellant

HUIBRECHT ELIZABETH SNYMAN

Second Appellant

And

PETRUS CORNELIUS JORDAAN N.O.

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 4 November 2016

Delivered: 29 November 2016

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] The respondent in this appeal is the executor in Namibia of the estates of his deceased parents, Mr and Mrs Jordaan. In that capacity, he instituted an action for eviction against Mr and Mrs Snyman, the appellants, from the farm Marwil No 541 registered in the name of his father, the late Mr Jordaan. His parents were married in community of property. He also claimed damages for holding over

against the Snymans. The High Court on 6 February 2015 upheld the executor's claims with costs, ordering the eviction of the Snymans from the farm and the payment of damages against them for holding over.

[2] The Snymans timeously noted an appeal against the judgment of the High Court on 9 March 2015. The appeal record was to be filed on 5 May 2015. But this did not occur. Instead, five volumes, said to constitute the record, were lodged on 17 June 2015.

First condonation application

[3] Shortly afterwards and on 7 July 2015, a condonation application was filed on behalf of the Snymans. I refer to this as the first condonation application.

[4] The founding affidavit was deposed to by junior counsel in the matter. In a detailed explanation, he said that he had caused a memorandum to be prepared setting out the dates for taking the various steps to prosecute the appeal in accordance with the rules of this court. He did so because the instructing practitioner through the lengthy trial had in the meantime sold her practice to join the bar. The draft of the memorandum setting the dates had in fact been prepared by the erstwhile instructing practitioner, then a pupil at the bar. Unbeknown to counsel, the memorandum however contained an error. The date for lodging the record was incorrectly given as 18 June 2015. (The three month period in rule 5(5) had erroneously been calculated as 90 court days). Counsel only became aware of the error in late March 2015 after the memorandum had been dispatched. This

was because he was engaged in a demanding lengthy trial. He had at the time requested his experienced secretary to check that the calculated dates accorded with the rules.

[5] Counsel then prepared an amended memorandum to reflect the correct calculations but realised in late June 2015 that his amended memorandum had not been sent to the instructing legal practitioners. The realisation no doubt came about after a letter was sent by an assistant registrar on 22 June 2015, pointing out that the appeal was deemed to be withdrawn because the record was filed out of time (in accordance with rule 5(5)(a)). Security for costs, to be given before the record is filed, was also out of time as a consequence.

[6] The series of errors then became apparent and the first condonation application was filed on 7 July 2015. It is opposed by the executor, the respondent in the appeal. His opposing affidavit comprised mostly legal contentions, disputing the adequacy of the explanation tendered. It was also said that condonation should not be granted because the appeal enjoyed no reasonable prospects of success.

The second condonation application

[7] About five weeks before the hearing and on 29 September 2016, the appellants filed a second application for condonation. Shortly before that and in early September 2016, counsel discovered that the record which had been filed was materially incomplete.

[8] Evidence in the trial had been heard in two phases. At the conclusion of the plaintiff's (the executor's) case in October 2008, the Snymans applied for absolution from the instance. The presiding judge reserved judgment and took some considerable time to decide that issue. In a written judgment delivered on 28 August 2012, absolution was refused. The trial resumed in September 2014 when the Snymans each testified. Judgment was delivered on 6 February 2015.

[9] The record initially filed included only the transcribed evidence prior to the application for absolution and the judgment on that issue as well as the final judgment of 6 February 2015. Whilst it included the pleadings and notices, it also included a large body of material which does not form part of the record such as transcribed oral argument and discovery bundles. It was thus defective as well as being incomplete.

[10] In support of the second condonation application, the instructing legal practitioner for the Snymans pointed out that this was her first appeal to this court. The initial record was completed from the court file which only had copies of the transcribed evidence up to the absolution application which was bound and lodged. She had not been in the trial and had compiled that record with reference to what was in the court file and the file in her office and said she compared the contents of the two respective files. It is pointed out that the full record containing all the transcribed evidence must have become separated from the court file. This was confirmed when a thorough search for that portion of the record could not be

found after the inadequacy of the initially lodged record had been discovered. It is speculated that this portion may have become mislaid and lost when the presiding judge vacated her chambers.

[11] A call to the presiding judge revealed that the second portion of evidence had been transcribed and may have been put in a separate lever arch file. This file could not be traced. Nor could any copies of the transcribed record be found in the court archives or at the offices of the transcribers. The missing portion had to be transcribed afresh and exhibits compiled and appended. The further four volumes comprising the Snyman's evidence and exhibits were lodged on 29 September 2016. The second condonation application was also filed on the same date.

Principles applicable to condonation

[12] It is well established that applicants for condonation are required to meet the two requisites of good cause before they can succeed in such an application. These firstly entail establishing a reasonable and acceptable explanation for the non-compliance with the rule(s) in question and secondly satisfying the court that there are reasonable prospects of success on appeal.

[13] This court has been required to deal with these forms of applications with unacceptable frequency over the years and in *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at para 5 usefully summarised the jurisprudence of this court on the subject of condonation applications for the benefit of practitioners in the following way:

'The application for condonation must thus be lodged without delay, and must provide a full, detailed and accurate explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include —

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona fides* of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant and inexplicable.'

[14] This court has also on several occasions emphasised the frequency of failures to comply with the rules of this court and the consequent deleterious effects for the administration of justice. (See *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC)).

[15] One of the recurring failures on the part of practitioners concerns the filling of the appeal record. As was also recently said by this court in *Tweya and others v Herbert and others*, Case no SA 76/2014 (6 July 2016) at para 26:

‘A recurring theme over the past several years in this court has been repeated failures by practitioners to comply with the rules of this court. This had led to delays in finalising appeals and severely disrupts the administration of justice and the functioning of this court. A common occurrence in the non-compliance with the rules has been the frequent failure to file records on time and also lodging records which are incomplete or fail to comply with the rules. There was emphatic reference to this recurring theme in *Katjaimo*¹ by Damaseb, DCJ:

“Strydom AJA in *Channel Life Namibia (Pty) Ltd v Otto* lamented the problems that have been caused by delays and non-compliance with the rules of this court when he said:

‘. . . (A)t each session of the Supreme Court there are various applications for condonation because of non-compliance with some or other of the rules of the court. Many of these applications could have been avoided through the application of diligence and by giving the process a little more attention. Practitioners should inform themselves of the provisions of the Rules of the Supreme Court and cannot accept that those rules are the same as that of the High Court. It further seems that it has become the practice of legal practitioners to leave the compilation of the record entirely in the hands of the recording company. That, however, does not relieve an appellant, who is responsible for the preparing of the appeal record, from ensuring that the record is complete and complying with the rules of this court.

¹ *Katjaimo v Katjaimo & others* SA 36/2013 (SC).

The past session again saw five to six records which were not complete. This is an inconvenience to judges who must prepare for the coming session and further places a burden on the staff of the court to get practitioners to rectify the failures. All this add to the costs of appeal and the time is fast approaching where the court will have to either refuse to hear such matters or order the legal practitioner responsible to pay the unnecessary costs occasioned by his or her failure.'

This warning was echoed by none other than the Chief Justice recently in *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia SA 87/2011 (SC)*, when he observed as follows:

"Virtually every appeal that I was involved in during the recent session of the court was preceded by an application for condonation for the failure to comply with one or other rule of the Rules of Court. In all those appeal matters, valuable time and resources were spent on arguing preliminary issues relating to condonation instead of dealing with the merits of the appeals. In spite of observations in the past that the court views the disregard of the rules in a serious light, the situation continues unabated and the attitude of some legal practitioners appears to be that it is all well as long as an application for condonation is made. Such an attitude is unhelpful and is to be deprecated."

The learned Chief Justice added (para 6):

"It is therefore of cardinal importance that practitioners who intend to practice at the Supreme Court and who are not familiar with its rules take time to study the rules and apply them correctly to turn the tide of applications for condonation that is seriously hampering

the court's ability to deal with the merits of appeals brought to it with attendant expedition.”

[16] The duties of practitioners in connection with lodging records were succinctly summarised by Strydom AJA in *Channel Life* in para 48 of the judgment:

‘In regard to the record of appeal, practitioners must check the record to ensure —

(i) that there are no pages missing from the record;

(ii) that all the relevant documentary exhibits are before the court;

(iii) that there are no unnecessary documents included in the record, such as heads of argument used in the court *a quo* and arguments raised in that court, unless such heads of argument are relevant to some or other aspect of the appeal, eg to show a concession made by the opposite party;

(iv) that the record complies in every respect with the provisions of rule 5 (8), (9), (10), (11), (12), (13) and (14) of the Rules of the Supreme Court.’

[17] As was said in para 28 of *Tweya*:

‘[28] This passage was again drawn to the attention of practitioners by Damaseb DCJ in *Katjaimo*. Both of these judgments have been reported. The Deputy Chief Justice directed the following unequivocal admonition to practitioners in *Katjaimo*:

“[34] Sufficient warning has been given by this court that the non-compliance with its rules is hampering the work of the court. The rules of this court, regrettably, are often more honoured in the breach than in the observance. That is intolerable. The excuse that

a practitioner did not understand the rules can no longer be allowed to pass without greater scrutiny. The time is fast approaching when this court will shut the door to a litigant for the unreasonable non-observance of the rules by his or her legal practitioner. After all, such a litigant may not be without recourse as he or she would in appropriate instances be able to institute a damages claim against the errant legal practitioner for their negligence under the Acquilian action. I wish to repeat what was said by O'Regan AJA in *Arangies*:

“There are times . . . where this court . . . will not consider the prospects of success in determining the application [for condonation] because the non-compliance with the rules has been glaring, flagrant and inexplicable.”

- [35] We hope that the cautionary observations made in this judgment will be taken seriously by all legal practitioners who practise in the Supreme Court. A legal practitioner has a duty to read the decided cases that emanate from the courts (both reported and unreported) and not simply grope around in the dark as seems to have become the norm for some legal practitioners, if judged by the explanations offered under oath in support of the condonation applications that come before the court.’

Application of these principles to the facts

[18] The defective record initially lodged was some 6 weeks late. A very detailed and candid explanation was provided for the erroneous advice given as to when it was to be filed. A further explanation is provided for the failure to have rectified that incorrect advice. The memorandum correcting the wrong advice was unfortunately not sent to the instructing legal practitioner responsible for the lodging of the record.

[19] Although the explanation for the errors and lapses is full and detailed, it is however clear that there was some negligence. But unlike so many of the instances of non-compliance with the rules encountered in this court, the practitioners involved had not simply sat back, lacking any alacrity. There had been wrong advice given on the calculation of the relevant period (within which the record was to be lodged). Had the initial lateness been the only instance of non-compliance, the inadequacy of the explanation could well have been saved by strong prospects of success in the appeal.

[20] But as is already stated, this was not the extent of the non-compliance with rule 5. The record itself was hopelessly deficient and excluded the evidence given by the defendants (the Snymans) after absolution had been refused – a very material omission. That is however not the only defect in the original record. It did not include exhibits. The discovery bundles included in the initial record should not have been there. They were erroneously inserted as part of the pre-trial process. The fact that these bundles included the exhibits does not avail the appellants. The exhibits should be properly identified and included as exhibits and discovery bundles should be omitted as they do not form part of the record. The initial record also wrongly included transcribed oral argument. It ended with not one but two judgments. The first was in respect of absolution from the instance. It was immediately followed by subsequent court orders in case management, postponing the matter to 15 April 2014 and then another postponing it to 3 June 2014 to see if another judge would be allocated. Then there was yet another order

postponing the matter for hearing on the fixed roll to 8 – 12 September 2014. There then follows the judgment of the court of 6 February 2016. It confirmed that the trial had proceeded on 8 until 10 September 2014. This was in addition to the earlier proceedings on 21 – 24 October 2008.

[21] The judgment in respect of the application for absolution followed by these three court orders, then immediately followed by the judgment on the merits should at the very minimum have alerted that practitioner to the fact that the evidence had been given after absolution was missing. This sequence should have caused her to enquire from those who had been in the matter as to what had transpired after the abortive absolution application up until the judgment on the merits.

[22] The duties of practitioners in putting together a record, cogently summarised by Strydom AJA in *Channel Life* and quoted above, had not been complied with when lodging that first attempt at the record. The first duty requires practitioners to check the record to ensure that there are no pages missing from the record. Counsel for the appellants argued that a practitioner is entitled to assume that a court record is complete. But this submission misses the point.

[23] An appeal record does not include everything on the court file – a frequently encountered fallacy. Written heads of argument found in the court file are often included, as well as oral transcripts of arguments and discovery bundles. The practitioner however states that the court file was checked by comparing it with the

file of her office. This exercise would have included the court orders after the absolution judgment which should have alerted her to evidence given on 8 to 10 September 2014. A cursory consideration of these documents should have revealed that a significant portion of the record was missing. Steps should have been taken to establish whether evidence was heard and the whereabouts of the transcript. I cannot accept that the practitioner's file would have had no reference to the subsequent evidence and proceedings.

[24] In the second instance a practitioner must ensure that all relevant documentary exhibits form part of the record. The discovery of the respective parties may and often does turn out to include exhibits. But not all discovered documents are usually proven as exhibits. Some exhibits may also not have been discovered and may be permitted to be adduced in evidence. But this fact – discovered documents included as such and no exhibits - should have alerted the practitioner to the fact that a portion of the record – in the form of exhibits – was also missing.

[25] Finally the defective initial record also included items such as discovered documents and transcribed oral argument which do not form part of the record. The practice by practitioners to indiscriminately include discovery bundles and argument in appeal records is to be deprecated and should in the future at the very least be visited with appropriate cost orders.

[26] The complete but defective record (because of the inclusion of unnecessary matter) was lodged some 19 months late. The cumulative effect of the overall non-compliance with rule 5 relating to records renders the explanation provided as less than cogent and thus inadequate in the circumstances. But before finally determining whether condonation and reinstatement should be granted, it is appropriate to briefly consider the prospects of success on appeal against the High Court's judgment.

Prospects of success

[27] In order to assess whether the Snymans' appeal against the judgment of the High Court enjoys prospects of success, the background facts to the claims, the pleadings and certain of the evidence are briefly referred to.

[28] The late Mr and Mrs Jordaan during their marriage in community of property acquired the farm Marwil (the farm) in 1984 in the name of the late Mr Jordaan. In a joint will they executed in 1993, they each bequeathed their respective estates of the first dying to the survivor. A subsequent will was prepared in 2000 but only Mr Jordaan signed it. Mrs Jordaan died on 20 February 2000 before she could sign that will. Some months later on 4 July 2000 and before any executor was appointed in her deceased estate, the late Mr Jordaan and Mr Snyman entered into a written lease agreement in which the former leased the farm to the latter.

[29] The lease agreement included an option clause for the purchase and sale of the farm at a given price. The option required that 'in the event of the lessee

wanting to exercise this option to purchase the property, he shall notify the lessor in writing on or before 1 March 2003 of his intention’.

[30] The late Mr Jordaan was on 20 February 2001 appointed as executor in Mrs Jordaan’s South African estate. He subsequently died on 25 September 2002. After that date, the rental for the farm was received by his attorney, Mr Waldemar Strauss of Schweizer-Reyneke in South Africa. The latter had also been nominated as executor in a codicil to Mr Jordaan’s will but was never appointed to that position by the Master. His address was provided as the lessor’s domicilium in the lease agreement.

[31] Mr Snyman telephoned Mr Strauss on 19 February 2003 to inform him that he intended to exercise the option. A letter dated 17 February 2003 giving notice of that intention was sent by registered mail from nearby Potchefstroom to Mr Strauss’s address in Schweizer-Reyneke. That letter was received by the post office on 27 February 2003 but only collected by Mr Strauss’s staff on 4 March 2003.

[32] The respondent was subsequently appointed as executor in Mr Jordaan’s estate. This was followed by an appointment as executor in respect of his late father’s estate in Namibia as well as that of his late mother in Namibia.

[33] On 25 July 2005, the executor instituted an action against the Snymans for their eviction from the farm and for damages for holding over in the sum of

N\$204 480 as representing the fair and reasonable rental for the farm from 1 March 2004 to 1 March 2007 and or further damages in the sum of N\$6680 plus VAT per month for the Snymans' occupation of the farm thereafter until the delivery of the farm to the executor.

[34] In defence to the claim, the Snymans pleaded that their occupation and possession of the farm arises from the lease. They pleaded that the option had been validly exercised and entitled them to possession. They also denied being married in community of property and Mrs Snyman denied being married.

[35] An extensive replication was filed on behalf of the executor. It pointed out that no executor was appointed for Mrs Jordaan's estate at the time Mr Snyman and the late Mr Jordaan entered the lease including the option. It was pleaded that, in the absence of being duly appointed as executor at that time, the late Mr Jordaan could not validly grant a valid option and that it was of no force and effect for this reason.

[36] The replication referred to the letter dated 17 February 2003 and pleaded that 'the purported acceptance is . . . invalid and of no force and effect'.

[37] In the alternative, it was contended that the option was not timeously exercised.

[38] It was also pleaded that the exercise of the option was invalid as being in conflict with s 17(2) of the Agricultural (Commercial) Land Reform Act, 6 of 1995 (the Land Reform Act) in that s 17 required that the farm should first be offered to the State and for a certificate of waiver to be issued. It was pleaded that it had not been offered to the State and that no certificate of waiver had been issued.

[39] It was also raised in the replication that the exercise of the option did not comply with the provisions of s 1 of the Formalities of Contracts of the Sale of Land Act, 71 of 1969 and is for that reason also of no force and effect.

The approach of the High Court

[40] The High Court concluded that the exercise of the option conflicted with s 17 of the Land Reform Act and found that it was void and unenforceable for that reason. That court found it unnecessary to express a view on the other grounds upon which the executor contended that the exercise of the option was invalid. The High Court thus found that the Snymans had not established a right of possession and ordered their eviction.

[41] As for the damages claim, the High Court rejected a point taken in the closing submissions that the claim should fail because no expert evidence was led as to a fair and reasonable rental for the farm. The reason for rejecting this argument was founded on an admission by Mr Snyman in cross examination that the rental for the farm was fair and reasonable. There was also an admission by him of subletting the farm for a greater sum. The court also took into account that

rentals had increased over the years and that the rental claimed was agreed upon for 2003/2004 and that the Snymans were still in occupation of that farm when their evidence was given some 10 years after the written lease had come to an end. The damages as claimed were awarded.

[42] The Snymans sought to appeal against the High Court's rulings on both claims. Detailed written and oral argument was advanced by the Snymans' counsel in respect of the enforceability of the option, addressing each of the grounds for illegality or unenforceability raised in the replication. It was also again argued that in the absence of expert evidence as to a reasonable rental, the damages claim should have failed. Counsel also pointed out that the damages award was made jointly and severally against both Mr and Mrs Snyman even though the parties were married out of community of property. Counsel for the executor conceded that this was done in error by the High Court.

[43] The amended claim alleged that the Snymans were married in community of property and claimed damages against them jointly and severally. The plea denied that proprietary regime and Mrs Snyman went further and denied being married. During their testimony, it emerged and was accepted that they were married out of community of property. At the conclusion of the High Court's judgment, it was merely stated in the order:

'The plaintiff's claims are upheld with costs . . . '.

without further specifying them. The court below acknowledged that the Snymans are married out of community of property. In upholding the claims, the High Court should have qualified the damages and only granted the award as against Mr Snyman. At the very least, the High Court's order would need to be rectified under s 19(b) of the Supreme Court Act, 15 of 1990 to address this error.

Was the option validly exercised?

[44] In both the written and oral argument advanced on behalf of the executor, it was also contended that the option had not been validly exercised because the purported acceptance was not unequivocal and unambiguous. Mr Snyman's letter of 17 February 2003, as translated, stated:

'17/02/2003

THE EXECUTOR
ESTATE: LATE A.J.J. JORDAAN

Dear Sir

RE MY OPTION TO PURCHASE FARM MARWIL

I refer you to the contract between myself and the late Mr Jordaan. Item 19 of the contract determines the following: "The LESSOR herewith grants to the LESSEE the right to purchase the property from him upon expiry of this agreement . . ."

Herewith I then want to give written notice that I intend to exercise this option DV as determined by the agreement.

I should like to receive notification in writing from you whether you are willing to sell this property to a Limited (Close) Corporation.

I should like to hear from you soon.

Regards

W.M. Snyman'

[45] Counsel for the Snymans objected to this point being argued as it was not separately raised in the replication. But the executor had contested that the option had been validly exercised. Several grounds with reference to statutory provisions were enumerated, although this specific point was not referred to. But what is clear is that in eviction proceedings, a plaintiff is required to prove ownership of the thing and that the defendants are in possession of the thing at the time of institution of the action. (See *Chetty v Naidoo* 1974 (3) SA 13 (A), at 18). If the defendants wish to reply on a right to possess, they must allege and prove the right (*Chetty* at 18G-H; *Myaka v Havemann & another* 1948 (3) SA 457 (A)).

[46] In this instance the Snymans admitted possession and alleged their right to possess arose by virtue of exercising the option. The validity of that was squarely placed in issue in the replication on the grounds referred to. Even though the lack of being unequivocal was not referred to in the replication, Mr Snyman was extensively cross examined on the wording employed in his letter of 17 February 2003. In particular, he was questioned at some length as to why he had proposed purchasing the farm in a close corporation.

[47] Counsel for the executor submitted that by requesting whether the executor would be prepared to sell the farm to a close corporation opened a new set of negotiations and that the letter of 17 February 2003 construed as a whole did not constitute an unequivocal exercise of the option.

[48] The importance of purchasing the farm through a close corporation was also emphasised in correspondence in December 2003 by Mr Snyman's attorney in Gobabis following up the purported exercise of the option. In cross examination, Mr Snyman confirmed that he was not a Namibian citizen when he wrote the letter of 17 February 2003. It transpired that he only became a citizen more than a year later in March 2004.

[49] When questioned as to why he had made that request, his answers in cross examination were entirely unsatisfactory. He at first said it would make 'managing the property easier when it was in a close corporation'. But he was unable to explain in what manner management would become easier. His answers to the question as to whether he had received legal advice on the issue before sending his letter of 17 February 2003 were also evasive. At first he repeatedly denied that he had received legal advice before sending that letter. After being confronted with what was put by senior counsel representing him to Mr Strauss (to the effect that he had received advice that there could be advantages according to Namibian law if he did purchase through a close corporation - which vague statement was unfortunately not further explained), Mr Snyman was eventually constrained to

admit that he may have received advice before sending his letter of 17 February 2003. It was also apparent from his cross examination that he was conversant with some of the features of the Land Reform Act. It was directly put to him that the attempt to purchase the farm through a close corporation was for the purpose of avoiding the prohibition on purchases of agricultural land by foreigners as he was not a Namibian citizen at that time. He denied this.

[50] The terms of the purported exercise of the option were thus extensively canvassed in cross examination and in particular his request to acquire ownership of the farm through a close corporation. The executor had in the replication expressly placed in issue that the option had been validly exercised. The issue was also raised in some detail in the written heads of argument filed on behalf of the executor well in advance of the hearing. Whether or not the letter of 17 February 2003 constitutes an unequivocal acceptance of the terms of the option is furthermore a matter of construction of that letter in the light of the circumstances. The letter itself is to be construed as a whole. No additional evidence should be necessary to prove the intention of the party accepting an offer. The objection to this point being raised in argument is thus without substance. It had been sufficiently pleaded and had been canvassed extensively in cross-examination – without objection.

[51] It is well established that the acceptance of an offer and exercise of an option must be unequivocal. (R H Christie *The Law of Contract in South Africa*, 5

ed, p 60 and the authorities collected there). As was stated by Greenberg JA in *Boerne v Harris* 1949 (1) SA 793 (A) at 801:

'It seems to me to follow that the letter, in order to be effective as an exercise of the right of renewal, must unequivocally convey to the recipient, using ordinary reason and knowledge, that it is intended to be such an exercise. It must leave no room for doubt. This recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of the letter.'

[52] In the course of his judgment, Greenberg JA, with reference to authority at 800 – 801, drew a distinction between ambiguous provisions in a contract and ambiguous provisions in a letter of acceptance. He concluded that the contract is to be interpreted by a court as best it can, leaning in favour of lending validity to it. On the other hand, a letter of acceptance, emanating as it does from one party, cannot be imposed upon the other party unless the provisions of that letter are unequivocal in its terms. (See Christie at p 61).

[53] The *Boerne* matter concerned a lease which conferred an option to renew upon a lessee for renewal of the lease for a further 5 years from the expiration of the initial period (on 15 April 1947). The lessee's attorney addressed a letter to renew the lease for 5 years with effect from 15 October 1946. The majority of the court found (per Greenberg, JA) that the letter was too ambiguous to constitute a valid acceptance of the offer contained in the lease.

[54] The letter of 17 February 2003 is also to be read with the lease. It affords Mr Snyman an option to purchase. That option is extended to the lessee, Mr Snyman.

[55] Counsel for the executor contended that the letter merely manifested an intention to exercise the option (and not actually exercising the option) and secondly opened up a new set of negotiations by proposing that the farm be purchased by a close corporation. By stating an intention to exercise the option would in my view be sufficient to exercise the option. (See *Kahn v Raatz* 1976 (4) SA 543 (A)). Counsel however also argued that the letter construed as a whole conveyed an intention to purchase to be exercised through a close corporation. There is much merit in this submission. There would in my view be insufficient separation between the expressed intention to accept the option and the proposal to do so through a close corporation. This construction is also borne out of the facts as Mr Snyman was not in a position to take transfer of the farm given the prohibition in s 58 of the Land Reform Act for foreigners to take transfer of agriculture land as defined.

[56] As this court stated in *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* 2014 (2) NR 464 (SC) para 71:

‘Where the option granted did not provide for a date of transfer of the property, once the option had been exercised, transfer must take place within a reasonable time. (See *Visagie v Gerryts en 'n Ander* 2000 (3) SA 670 (C) at 676C.)’

[57] I agree with counsel for the executor that the letter construed as a whole in the light of the circumstances evinces an intention to exercise the option through a close corporation. Mr Snyman was at that time (on 17 February 2003) not a Namibian citizen. He was thus precluded by s 58 of the Land Reform Act from taking transfer of the farm. This no doubt accounted for his proposal to acquire it in a close corporation even though he unconvincingly denied a proposition to that effect. His evidence on this issue was wholly unsatisfactory and falls to be rejected.

[58] There is thus insufficient separation between the intention to exercise the option and the proposal to do so through a close corporation. The latter proposal is indicative of the letter of 17 February 2003 not being severed into independent parts as stated in *JRM Furniture Holdings v Cowlin* 1983 (4) 541 (W) applied by this court in *Witvlei Meat* para 76. As was stated in *JRM Furniture Holdings* matter (at 547 B-C), the condition sought to be imposed was 'part and parcel' of the acceptance which in the result is invalid due to 'non correspondence with the offer'. The same result arises in this matter as the letter of 17 February 2003 by proposing that the purchase and sale be to a close corporation, resulted in an invalid exercise of the option. It amounted to an attempt to vary the terms of an offer which destroyed the validity of the attempt to accept it.

[59] It follows that Mr Snyman did not validly exercise the option for this reason alone. Given this conclusion (of invalidity of the exercise of the option on this

ground), it is not necessary to address the other grounds upon which the exercise of the option was challenged.

[60] It follows that an appeal against the first claim does not enjoy prospects of success.

Claim 2

[61] As for the second claim, the Snymans did not apply for absolution in respect of this claim. That application was confined to the claim for eviction.

[62] The lease agreement expired at the end of February 2004. During the trial it emerged that the Snymans continued to occupy the farm since March 2004 until they gave their evidence (in September 2014) and had not paid any rental for the farm since March 2004. Mr Snyman in cross-examination expressly acknowledged that the rental payable in the last year of the lease was both fair and reasonable. The High Court had no difficulty in rejecting the point that no award should be made in the absence of expert evidence that the rental was fair and reasonable and in my view correctly so. Mr Snyman's acknowledgment to that effect would plainly suffice. Once he admitted and accepted that, there was no need for expert evidence to that effect. This point taking cannot avail Mr Snyman.

[63] The court below was correct in upholding the claim for damages, but as was pointed out, it should only be made against Mr Snyman and the order would need to be corrected to reflect that.

[64] It follows that an appeal against the second claim likewise does not enjoy prospects of success.

Conclusion

[65] Given the finding of this court that there are no prospects of success in this appeal and the finding that an adequate explanation had not been provided for the non-compliance with rule 5, the applications for condonation for the late filing of the appeal record and the reinstatement of the appeal fall to be dismissed.

Order

[66] The following order is made:

1. The applications for condonation for the late filing of the record of appeal and reinstatement of the appeal are dismissed.
2. The appeal is struck from the roll.
3. The appellants are ordered to pay the costs of the respondent. These costs include the costs of one instructed and one instructing counsel.
4. The order of the High Court is amended to read:

- 'a. Plaintiff's claim 1 is upheld with costs.

- b. Plaintiff's claim 2 is upheld with costs, against the first defendant only.

- c. The costs of the application for absolution are awarded in favour of the plaintiff.

- d. The costs awarded above are to include the costs of one instructed and one instructing counsel.'

SMUTS JA

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT:

R Heathcote, SC
(with him Mr G Dicks)

Instructed by Kirsten & Co

RESPONDENTS:

P J Vermeulen

Instructed by Van der Merwe-
Greeff Andima Inc.